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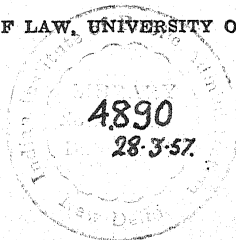
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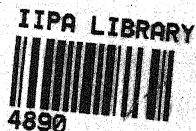
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HANDBOOK OF AMERICAN CONSTITUTIONAL LAW

By HENRY ROTTSCHAEFER
PROFESSOR OF LAW, UNIVERSITY OF MINNESOTA



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PREFACE

THE law of the Constitution of the United States is the only part of the total body of constitutional law found within the United States which prevails throughout the whole of it. The law based on the constitution of any given state is in force only within that state. It is quite impossible to deal with the entire body of federal and state constitutional law within the limits of a brief text. The present text has, accordingly, limited itself to a discussion of certain general principles that have been incorporated into every one of the constitutions of our system, and of the leading doctrines and principles that have been developed in the course of the judicial construction of the federal constitution. Its aim has been to set forth those doctrines and principles in systematic form so far as these have been developed through the innumerable decisions involving the application of constitutional provisions to the facts of the concrete cases that have been determined by the courts. The method of treatment has been analytical rather than historical; but, wherever desirable and possible, the material has been so organized as to emphasize the changes in law that have been effected in the course of the adaptation of constitutional formulae to the changing needs and conceptions of a dynamic society. This has been done for the purpose of presenting a more accurate account of the judicial processes through which the actual content of the concepts, doctrines and principles has been modified while the formal constitutional bases have remained relatively static. The theory underlying the method of treatment that has been followed has been that a knowledge of the course of decisions, and of the doctrines and principles implicit or explicit therein, is indispensable to an understanding of the process by which those doctrines and principles are being currently reinterpreted in what the future is certain to appraise as epoch-making decisions. The writer has aimed to include all of the leading cases decided by the Supreme Court of the United States on the matters covered by the text. It is hoped that the book may prove useful to practitioners of the law as well as to instructors and students in the law schools.

HENRY ROTTSCHAEFER.

MINNEAPOLIS, MINNESOTA

January, 1939.

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CONSTITUTION OF THE UNITED STATES—1787*

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.

ARTICLE I

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section. 2. ¹ The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Quali-

*In May, 1785, a committee of Congress made a report recommending an alteration in the Articles of Confederation, but no action was taken on it, and it was left to the State Legislatures to proceed in the matter. In January, 1786, the Legislature of Virginia passed a resolution providing for the appointment of five commissioners, who, or any three of them, should meet such commissioners as might be appointed in the other States of the Union, at a time and place to be agreed upon, to take into consideration the trade of the United States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several States such an act, relative to this great object, as, when ratified by them, will enable the United States in Congress effectually to provide for the same. The Virginia commissioners, after some correspondence, fixed the first Monday in September as the time, and the city of Annapolis as the place for the meeting, but only four other States were represented, viz.: Delaware, New York, New Jersey, and Pennsylvania: the commissioners appointed by Massachusetts, New Hampshire, North Carolina, and Rhode Island failed to attend. Under the circumstances of so partial a representation, the commissioners present agreed upon a report, (drawn by Mr. Hamilton, of New York,) expressing their unanimous conviction that it might essentially tend to advance the interests of the Union if the States by which they were respectively delegated would concur, and use their endeavors to procure the concurrence of the other States, in the appointment of commissioners to meet at Philadelphia on the second Monday of May following, to take into consideration the situation of the United States; to devise such further provisions as should appear to them necessary to render the Constitution of the Federal Government adequate to the exigencies of the Union; and to report such an act for that purpose to the United States in Congress assembled as, when agreed to by them, and afterwards confirmed by the Legislatures of every State, would effectually provide for the same.

Congress, on the 21st of February, 1787, adopted a resolution in favor of a convention, and the Legislatures of those States which had not already done so (with the exception of Rhode Island) promptly appointed delegates. On the 25th

fications requisite for Electors of the most numerous Branch of the State Legislature.

² No Person shall be a representative who shall not have attained to the Age of twenty-five Years and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

³ [Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

The clause of this paragraph inclosed in brackets was amended, as to the mode of apportionment of representatives among the several states, by the fourteenth amendment, § 2, post, and as to taxes on incomes without apportionment, by the sixteenth amendment, post.

of May, seven States having convened, George Washington, of Virginia, was unanimously elected President, and the consideration of the proposed constitution was commenced. On the 17th of September, 1787, the Constitution as engrossed and agreed upon was signed by all the members present, except Mr. Gerry, of Massachusetts, and Messrs. Mason and Randolph, of Virginia. The president of the convention transmitted it to Congress, with a resolution stating how the proposed Federal Government should be put in operation, and an explanatory letter. Congress, on the 28th of September, 1787, directed the Constitution so framed, with the resolutions and letter concerning the same, to "be transmitted to the several Legislatures in order to be submitted to a convention of delegates chosen in each State by the people thereof, in conformity to the resolves of the convention."

On the 4th of March, 1789, the day which had been fixed for commencing the operations of Government under the new Constitution, it had been ratified by the conventions chosen in each State to consider it, as follows: Delaware, December 7, 1787; Pennsylvania, December 12, 1787; New Jersey, December 18, 1787; Georgia, January 2, 1788; Connecticut, January 9, 1788; Massachusetts, February 6, 1788; Maryland, April 28, 1788; South Carolina, May 23, 1788; New Hampshire, June 21, 1788; Virginia, June 26, 1788; and New York, July 26, 1788.

The President informed Congress, on the 28th of January, 1790, that North Carolina had ratified the Constitution November 21, 1789; and he informed Congress on the 1st of June, 1790, that Rhode Island had ratified the Constitution May 29, 1789. Vermont, in convention, ratified the Constitution January 10, 1790, and was, by an act of Congress approved February 19, 1791, "received and admitted into this Union as a new and entire member of the United States."

⁴ When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

⁵ The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section. 3. ¹ [The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.]

This paragraph and the clause of paragraph 2 of this section next following, inclosed in brackets, were superseded by the seventeenth amendment, post.

² Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one-third may be chosen every second Year; [and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.]

See note to preceding paragraph of this section.

³ No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

⁴ The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

⁵ The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

⁶ The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

⁷ Judgment in Cases of Impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject

to Indictment, Trial, Judgment and Punishment, according to Law.

Section. 4. ¹ The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

² The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section. 5. ¹ Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

² Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

³ Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those present, be entered on the Journal.

⁴ Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section. 6. ¹ The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

² No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United

States, shall be a Member of either House during his Continuance in Office.

Section. 7. ¹ All bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

² Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

³ Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section. 8. ¹ The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

² To borrow Money on the credit of the United States;

³ To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

⁴ To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

⁵ To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

⁶ To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

⁷ To establish Post Offices and post Roads;

⁸ To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

⁹ To constitute Tribunals inferior to the supreme Court;

¹⁰ To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

¹¹ To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

¹² To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

¹³ To provide and maintain a Navy;

¹⁴ To make Rules for the Government and Regulation of the land and naval Forces;

¹⁵ To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

¹⁶ To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

¹⁷ To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

¹⁸ To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section. 9. ¹ The Migration or Importation of such Persons as any of the States now existing shall think proper to admit,

shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

² The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

³ No Bill of Attainder or ex post facto Law shall be passed.

⁴ No Capitation, or other direct, tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

⁵ No Tax or Duty shall be laid on Articles exported from any State.

⁶ No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

⁷ No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

⁸ No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section. 10. ¹ No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

² No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

³ No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace,

enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE II

Section. 1. ¹ The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

² Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[The electors shall meet in their respective States, and vote by ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two-thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice-President.]

This paragraph, inclosed in brackets, was superseded by the twelfth amendment, post.

³ The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

⁴ No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.

⁵ In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

⁶ The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

⁷ Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section. 2. ¹ The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

² He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be

established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

* The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section. 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2. ¹ The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States,—between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

² In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

³ The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section. 3. ¹ Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

² The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE IV

Section. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section. 2. ¹ The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

² A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up to be removed to the State having Jurisdiction of the Crime.

³ No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section. 3. ¹ New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be

formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

² The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

ARTICLE VI

¹ All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

² This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

³ The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and

judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE VII

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

DONE in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of Our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth. IN WITNESS whereof We have hereunto subscribed our Names,

Go. WASHINGTON—*Presidt.*
and deputy from Virginia

New Hampshire

JOHN LANGDON

NICHOLAS GILMAN

Massachusetts

NATHANIEL GORHAM

RUFUS KING

Connecticut

WM. SAML. JOHNSON

ROGER SHERMAN

New York

ALEXANDER HAMILTON

New Jersey

WIL: LIVINGSTON

WM. PATERSON.

DAVID BREARLEY.

JONA: DAYTON

Pennsylvania

B. FRANKLIN

THOS. FITZSIMONS

THOMAS MIFFLIN

JARED INGERSOLL

ROBT. MORRIS

JAMES WILSON.

GEO. CLYMER

GOUV MORRIS

Delaware

GEO: READ

RICHARD BASSETT

GUNNING BEDFORD jun

JACO: BROOM

JOHN DICKINSON

Maryland

JAMES MCHENRY

DANL. CARROLL.

DAN OF ST THOS JENIFER

Virginia

JOHN BLAIR—

JAMES MADISON Jr.

North Carolina

WM. BLOUNT

HU WILLIAMSON

RICHD. DOBBS SPAIGHT.

South Carolina

J. RUTLEDGE

CHARLES PINCKNEY

CHARLES COTESWORTH PINCKNEY PIERCE BUTLER.

Georgia

WILLIAM FEW

ABR BALDWIN

Attest

WILLIAM JACKSON *Secretary*

**Articles in Addition to, and Amendment of, the Constitution of
the United States of America, Proposed by Congress, and
Ratified by the Legislatures of the Several States Pursuant
to the Fifth Article of the Original Constitution**

[ARTICLE I]*

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

[ARTICLE II]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

*The first ten amendments to the Constitution of the United States were proposed to the legislatures of the several States by the First Congress, on the 25th of September 1789. They were ratified by the following States, and the notifications of ratification by the governors thereof were successively communicated by the President to Congress: New Jersey, November 20, 1789; Maryland, December 19, 1789; North Carolina, December 22, 1789; South Carolina, January 19, 1790; New Hampshire, January 25, 1790; Delaware, January 28, 1790; Pennsylvania, March 10, 1790; New York, March 27, 1790; Rhode Island, June 15, 1790; Vermont, November 3, 1791, and Virginia, December 15, 1791. There is no evidence on the Journals of Congress that the legislatures of Connecticut, Georgia, and Massachusetts ratified them.

[ARTICLE III]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

[ARTICLE IV]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[ARTICLE V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[ARTICLE VI]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

[ARTICLE VII]

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

[ARTICLE VIII]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

[ARTICLE IX]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

[ARTICLE X]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

[ARTICLE XI]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.

The eleventh amendment to the Constitution of the United States was proposed to the legislatures of the several States by the Third Congress, on the 5th September, 1794, and was declared in a message from the President to Congress, dated the 8th of January, 1798, to have been ratified by the legislatures of three-fourths of the States.

[ARTICLE XII]

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a ma-

jority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

The twelfth amendment to the Constitution of the United States was proposed to the legislatures of the several States by the Eighth Congress, on the 12th of December, 1803, in lieu of the original third paragraph of the first section of the second article, and was declared in a proclamation of the Secretary of State, dated the 25th of September, 1804, to have been ratified by the legislatures of three-fourths of the States.

[ARTICLE XIII]

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

The thirteenth amendment to the Constitution of the United States was proposed to the legislatures of the several States by the Thirty-eighth Congress, on the 1st of February, 1865, and was declared, in a proclamation of the Secretary of State, dated the 18th of December, 1865, to have been ratified by the legislatures of twenty-seven of the thirty-six States, viz: Illinois, Rhode Island, Michigan, Maryland, New York, West Virginia, Maine, Kansas, Massachusetts, Pennsylvania, Virginia, Ohio, Missouri, Nevada, Indiana, Louisiana, Minnesota, Wisconsin, Vermont, Tennessee, Arkansas, Connecticut, New Hampshire, South Carolina, Alabama, North Carolina, and Georgia.

[ARTICLE XIV]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The fourteenth amendment to the Constitution of the United States was proposed to the legislatures of the several States by the Thirty-ninth Congress, on the 16th of June, 1866. On the 21st of July, 1868, Congress adopted and transmitted to the Department of State a concurrent resolution, declaring that "the legislatures of the States of Connecticut, Tennessee, New Jersey, Oregon, Vermont, New York, Ohio, Illinois, West Virginia, Kansas, Maine, Nevada, Missouri, Indiana, Minnesota, New Hampshire, Massachusetts, Nebraska, Iowa, Arkansas, Florida, North Carolina, Alabama, South Carolina, and Louisiana, being three-fourths and more of the several States of the Union, have ratified the fourteenth article of amendment to the Constitution of the United States, duly proposed by two-thirds of each House of the Thirty-ninth Congress: Therefore, Resolved, That

said fourteenth article is hereby declared to be a part of the Constitution of the United States, and it shall be duly promulgated as such by the Secretary of State." The Secretary of State accordingly issued a proclamation, dated the 28th of July, 1868, declaring that the proposed fourteenth amendment had been ratified, in the manner hereafter mentioned, by the legislatures of thirty of the thirty-six States, viz: Connecticut, June 30, 1866; New Hampshire, July 7, 1866; Tennessee, July 19, 1866; New Jersey, September 11, 1866, (and the legislature of the same State passed a resolution in April, 1868, to withdraw its consent to it;) Oregon, September 19, 1866; Vermont, November 9, 1866; Georgia rejected it November 13, 1866, and ratified it July 21, 1868; North Carolina rejected it December 4, 1866, and ratified it July 4, 1868; South Carolina rejected it December 20, 1866, and ratified it July 9, 1868; New York ratified it January 10, 1867; Ohio ratified it January 11, 1867, (and the legislature of the same State passed a resolution in January, 1868, to withdraw its consent to it;) Illinois ratified it January 15, 1867; West Virginia, January 16, 1867; Kansas, January 18, 1867; Maine, January 19, 1867; Nevada, January 22, 1867; Missouri, January 26, 1867; Indiana, January 29, 1867; Minnesota, February 1, 1867; Rhode Island, February 7, 1867; Wisconsin, February 13, 1867; Pennsylvania, February 13, 1867; Michigan, February 15, 1867; Massachusetts, March 20, 1867; Nebraska, June 15, 1867; Iowa, April 3, 1868; Arkansas, April 6, 1868; Florida, June 9, 1868; Louisiana, July 9, 1868; and Alabama, July 13, 1868. Georgia again ratified the amendment February 2, 1870. Texas rejected it November 1, 1866, and ratified it February 18, 1870. Virginia rejected it January 19, 1867, and ratified October 8, 1869. The amendment was rejected by Kentucky January 10, 1867; by Delaware February 8, 1867; by Maryland March 23, 1867, and was not afterward ratified by either State.

[ARTICLE XV]

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

The fifteenth amendment to the Constitution of the United States was proposed to the legislatures of the several States by the Fortieth Congress, on the 27th of February, 1869, and was declared, in a proclamation of the Secretary of State, dated March 30, 1870, to have been ratified by the legislatures of twenty-nine of the thirty-seven States. The dates of these ratifications (arranged in the order of their reception at the Department of State) were: from North Carolina, March 5, 1869; West Virginia, March 3, 1869; Massachusetts, March 9-12, 1869; Wisconsin, March 9, 1869; Maine, March 12, 1869; Louisiana, March 5, 1869; Michigan, March 8, 1869; South Carolina, March 16, 1869; Pennsylvania, March 26, 1869; Arkansas, March 30, 1869; Connecticut, May 19, 1869; Florida, June 15, 1869; Illinois, March 5, 1869; Indiana, May 13-14, 1869; New York, March 17-April 14, 1869, (and the legislature of the same State passed a resolution January 5, 1870, to withdraw its consent to it;) New Hampshire, July 7, 1869; Nevada, March 1, 1869; Vermont, October 21, 1869; Virginia, October 8, 1869; Missouri, January 10, 1870; Mississippi, January 15-17, 1870; Ohio, January 27, 1870; Iowa, February 3, 1870; Kansas, January 18-19, 1870; Minnesota, February 19, 1870; Rhode Island, January 18, 1870; Nebraska, February 17, 1870; Texas, February 18, 1870. The State of Georgia also ratified the amendment February 2, 1870.

[ARTICLE XVI]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment

among the several states, and without regard to any census or enumeration.

The sixteenth amendment to the Constitution of the United States was proposed to the legislatures of the several states by the Sixty-First Congress, on the 31st of July, 1909, and was declared, in a proclamation by the Secretary of State, dated the 25th of February, 1913, to have been ratified by the legislatures of the states of Alabama, Kentucky, South Carolina, Illinois, Mississippi, Oklahoma, Maryland, Georgia, Texas, Ohio, Idaho, Oregon, Washington, California, Montana, Indiana, Nevada, North Carolina, Nebraska, Kansas, Colorado, North Dakota, Michigan, Iowa, Missouri, Maine, Tennessee, Arkansas, Wisconsin, New York, South Dakota, Arizona, Minnesota, Louisiana, Delaware, and Wyoming, in all thirty-six, said states constituting three-fourths of the whole number of states. The legislatures of New Jersey and New Mexico also passed resolutions ratifying the said proposed amendment.

[ARTICLE XVII]

The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.

When vacancies happen in the representation of any state in the Senate, the executive authority of such state shall issue writs of election to fill such vacancies: Provided, that the legislature of any state may empower the executive thereof to make temporary appointment until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

The seventeenth amendment to the Constitution of the United States was proposed to the legislatures of the several states by the Sixty-Second Congress, on the 15th of May, 1912, in lieu of the original first paragraph of section 3 of article 1, and in lieu of so much of paragraph 2 of the same section as related to the filling of vacancies, and was declared, in a proclamation by the Secretary of State, dated the 31st of May, 1913, to have been ratified by the legislatures of the states of Massachusetts, Arizona, Minnesota, New York, Kansas, Oregon, North Carolina, California, Michigan, Idaho, West Virginia, Nebraska, Iowa, Montana, Texas, Washington, Wyoming, Colorado, Illinois, North Dakota, Nevada, Vermont, Maine, New Hampshire, Oklahoma, Ohio, South Dakota, Indiana, Missouri, New Mexico, New Jersey, Tennessee, Arkansas, Connecticut, Pennsylvania, and Wisconsin, said states constituting three-fourths of the whole number of states.

[ARTICLE XVIII]

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

This amendment was proposed to the legislatures of the several states by the Sixty-Fifth Congress, on the 19th day of December, 1917, and was declared, in a proclamation by the Acting Secretary of State, dated on the 29th day of January, 1919, to have been ratified by the legislatures of the states of Alabama, Arizona, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, South Carolina, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming; said states constituting three-fourths of the whole number of states in the United States, and certified as valid to all intents and purposes as a part of the Constitution of the United States.

This amendment was repealed by Amendment XXI, p. xxxiv.

[ARTICLE XIX]

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

This amendment was proposed to the legislatures of the several states by the Sixty-Sixth Congress, on the 5th day of June, 1919, and was declared, in a proclamation by the Secretary of State, dated on the 26th day of August, 1920, to have been ratified by the legislatures of the states of Arizona, Arkansas, California, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin and Wyoming—said states constituting three-fourths of the whole number of states in the United States, and certified as valid to all intents and purposes as a part of the Constitution of the United States.

[AMENDMENT XX]

Section 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Sec. 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Sec. 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Sec. 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Sec. 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Sec. 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

This amendment was proposed to the legislatures of the several states by the Seventy-Second Congress, on the 3d day of March, 1932, and was declared, in a proclamation by the Secretary of State, dated on the 6th day of February, 1933, to have been ratified by the legislatures of the states of Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming—said states constituting three-fourths of the whole number of states in the United States, and certified as valid to all intents and purposes as a part of the Constitution of the United States.

[AMENDMENT XXI]

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Sec. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions

in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

This amendment to the Constitution was proposed to the several states by the Seventy-Second Congress, on the 20th day of February, 1933, and was declared, in a proclamation by the Secretary of State, dated on the 5th day of December, 1933, to have been ratified by conventions in the States of Arizona, Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming—said states constituting three-fourths of the whole number of states in the United States, and certified as valid to all intents and purposes as a part of the Constitution of the United States.

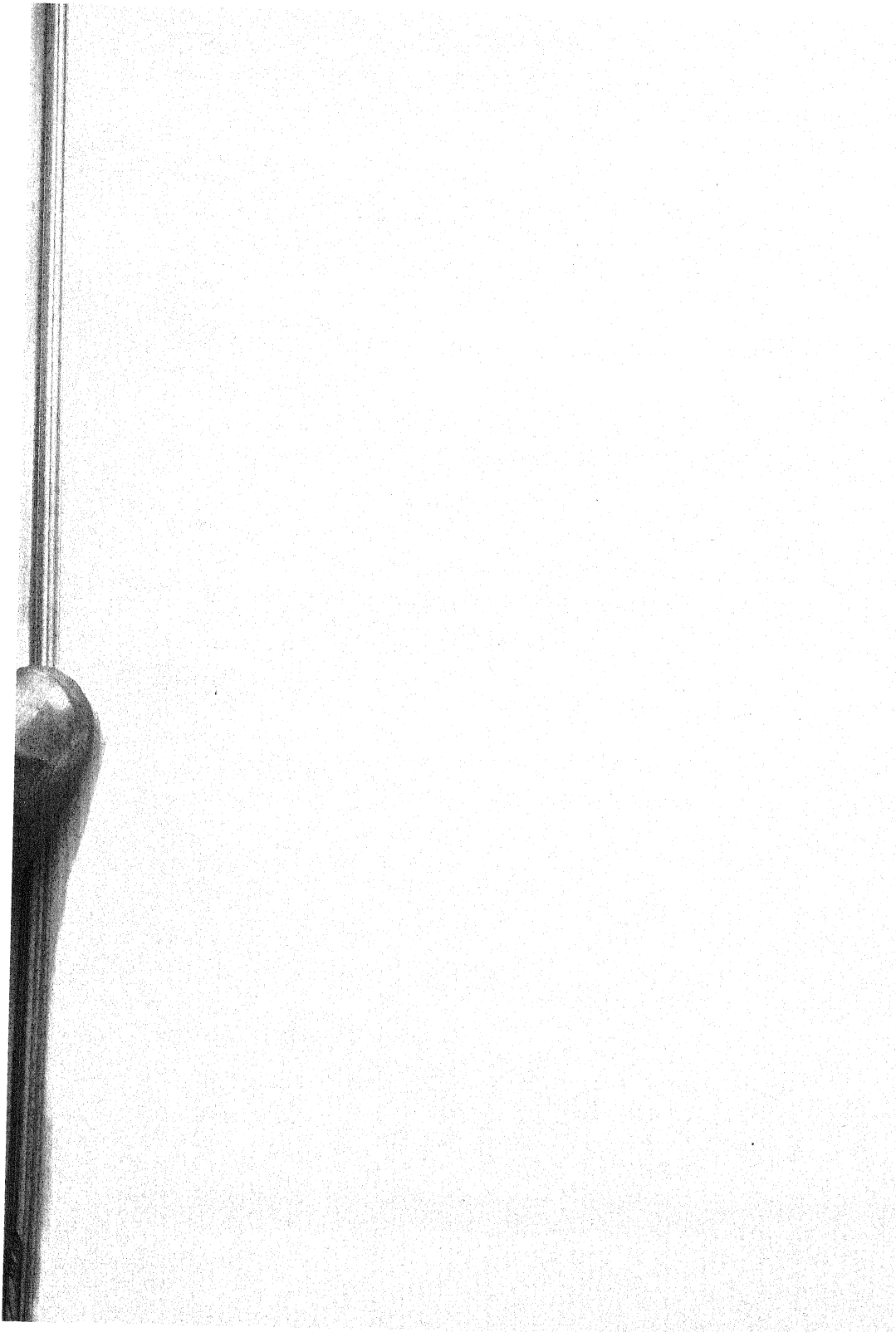
PROPOSED AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

[AMENDMENT —]

Section 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age.

Sec. 2. The power of the several States is unimpaired by this article except that the operation of State laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress.

Proposed by the Sixty-Eighth Congress on June 2, 1924.



HANDBOOK ON AMERICAN CONSTITUTIONAL LAW

INTRODUCTION

It has become an accepted tenet of our thinking on governmental problems that ours is a government of laws and not of men. The fact that is generally intended to be denoted by that theory is that the ultimate measure of the legality of the use of the force of organized governments is furnished by our system of written constitutions and not by the legally unlimited discretion of governmental officials temporarily entrusted with the exercise of governmental power. It is, however, undeniable that the decisions as to the conformity of the acts of such officials with constitutional requirements must ultimately be made by men. The mechanics of government can never be developed to provide a method for deciding such matters that will exclude the human factor. The power of making these ultimate decisions has been vested in our courts with respect to most of the questions of the constitutional powers of our governmental agencies. The law of our constitutional system is, accordingly, a body of judge-made law assuming the legal form of a series of judicial interpretations of the several written constitutions that compose our constitutional system. It would be futile to affirm that the language of those constitutions is at every point so precise and definite as to exclude differences of interpretation. A considerable degree of discretion as to the choice of alternative interpretations has always existed, and still exists. The extent of the possible judicial discretion in this respect varies with the definiteness or vagueness of the constitutional language. There is less room for it in interpreting such a provision of the federal Constitution as that denying to a state the power of emitting bills of credit than in construing the broad provisions of the Fourteenth Amendment prohibiting a state from depriving any person of life, liberty or

property without due process of law, and from denying to any person within its jurisdiction the equal protection of the laws. There are, however, few, if any, provisions of our constitutions the scope of which is so definitely ascertainable as to exclude all possibility of judicial discretion in its determination.

It follows from the foregoing considerations that a complete understanding of the judicial process in the development of our constitutional law is quite impossible without a complete understanding of the forces that have contributed to determining the actual choices that have been made from time to time from among the possible choices competing for recognition. It is equally impossible ever to achieve that complete understanding of those forces. The field of investigation is one in which it is generally impossible even to discover all such forces, and the absence of any satisfactory quantitative measures of the extent of the contribution of the forces that are known to have contributed to the origin and development of a given constitutional principle or doctrine inevitably gives to our knowledge in this field a degree of indefiniteness that impairs its usefulness both for the purpose of understanding the judicial process and for guidance in the prediction of the probable direction of future developments in the realm of constitutional law. The history of the development of the law of the federal Constitution is replete with illustrations of these patent truths. The language defining the scope of the legislative powers of the federal government has remained practically unchanged since the adoption of the Constitution, but this has not prevented judicial constructions thereof from reflecting the shifts that have occurred from time to time in political theories as to the need and desirability of a strong federal government that could be realized only by a broad construction of the express terms in which the Constitution defined those powers. The language of the due process clause of the Fourteenth Amendment to the federal Constitution has remained unchanged since its adoption, but the actual extent to which it has limited the activities of the states has varied so greatly that doubts have sometimes arisen as to the possibility of discovering in it any limiting principle other than that constituted by judicial conceptions of the desirable social order. It is abundantly clear that the actual decisions in neither of the two important fields of federal constitutional law, to which reference has been made, can be deduced by any known and recognized process of interpretation that assumes that the constitutional language has at all times constituted the dominant factor in the process. That

process can be understood only if account be taken of historical considerations, the conditions prevailing at the time when particular constitutional principles and doctrines have arisen or received given applications, theories as to the nature of the government intended to be established for the people of the United States by the federal Constitution, and general political, social and philosophical theories and changes therein in response to what are deemed the needs of a developing social order. Some or all of these have at all times furnished an important source on which courts have drawn for aid in their translation of general constitutional provisions into specific decisions on the constitutionality of concrete legislative and other governmental activities. These forces have seldom, if ever, been static, although the degree of their dynamic qualities has varied from time to time. It is because of their dynamic qualities that their influence upon the process of constitutional development has made it possible to give concrete meaning to the view that it is a Constitution that is being interpreted, and to adapt written constitutions to the needs of a dynamic social order though the forms of those constitutions remain relatively static.

It has already been stated that our knowledge of the forces that have contributed to the development of our constitutional law, and of the extent and manner of their contribution thereto, is practically certain to suffer from a degree of vagueness as great as that which characterizes the constitutional provisions that constitute the formal legal basis of judicial decisions on constitutional issues. It is desirable that there be speculative inquiries into what those forces have been and are, and into the manner and extent of their operation. It is equally desirable that the inherent weaknesses in the results of such inquiries be recognized lest there arise a dogmatism as uncritical as that involved in theories that assert the mechanical nature of the judicial process of construing our written constitutions. The merits of one dogmatism cannot be established by proving the demerits of another with which it competes. It is still true that all the competing theories are attempts to understand a process whose product reveals itself in specific decisions, principles, and doctrines that together form an imperfectly integrated body of law. The likelihood that the student will recognize the contribution thereto of non-legal factors will be enhanced by a systematic statement of the formal legal principles, doctrines and theories which the courts have employed, and still employ, in the process of giving constitutional provisions concrete applications. Such

a statement will reveal the general technique by which such non-legal factors enter into the judicial process of constitutional interpretation and thus affect the substance of our constitutional law. The part played by such forces can be in part discovered implicit or explicit in the reasoning found in the opinions rendered in support of the decisions construing our constitutions. It is in that reasoning that there can be detected the matter that gives to formally stated principles and doctrines their living content, and evidence of the struggles through which our constitutions are being continuously adapted to the requirements of a dynamic social order. The vast body of judicial decisions, opinions and reasoning constitutes the most important single source for the deduction of the principles and doctrines that courts have employed in the development of our constitutional law, and are likely to continue to employ in its further elaboration. There exists an incomplete, but nevertheless a considerable, degree of uniformity and continuity in the judicial process of construing written constitutions. Its existence to any degree makes possible a measure of doctrinal integration in this field of law. It is only because some degree of such uniformity and continuity exists that the development of our constitutional law has been an orderly rather than a chaotic process, and that it is possible to view it as a system of law rather than a mere congeries of isolated decisions. The principles in accordance with which non-legal factors have influenced the development of that body of law have not operated as uniformly as those legal factors indicated by judicially developed principles and doctrines of constitutional law. Furthermore, our knowledge of the former and of the manner and extent of their operation is quite meager and vague. This is an important reason why the orderly development of our system of constitutional law will continue to rely upon a technique in which prior judicial constructions of our constitutions will play a leading role. The text that follows will essay a systematic statement of the principles, doctrines and theories that have thus far been developed in the law of our constitutional system. It will consider certain general principles that are found in both the federal Constitution and in the constitutions of the several states, but will for the rest limit itself almost exclusively to a consideration of the law of the federal Constitution. The detailed treatment of the law of the constitutions of the several states is beyond the purview of any but an encyclopedic treatment of the law of our constitutional system.

CHAPTER I

LEGAL CHARACTER AND FUNCTION OF CONSTITUTIONS

1. Constitutional Law Defined.
- 2-4. Place of Constitutions in our Legal System.
- 5-8. Functions of Constitutions in our Governmental System.
9. Enforcement of Constitutions as Law.
- 10-12. Enforcement of Constitutions in our Federal System.
- 13-18. Construction and Interpretation of Constitutions.
- 19-20. Burdening and Regulating Judicial Review.

CONSTITUTIONAL LAW DEFINED

1. The subject matter of constitutional law consists of the fundamental legal principles in accordance with which the people of a politically organized society, or State, have established the system of government of such State.

PLACE OF CONSTITUTIONS IN OUR LEGAL SYSTEM

2. The constitutions of our legal system comprise a part of the body of law in accordance with which the people of the United States are governed.
3. The legal force of those constitutions is no greater than that of valid statutes and other valid acts of the governmental agencies established by them.
4. The supremacy of those constitutions consists solely in that they constitute the ultimate measure of the legality of the acts of the governmental agencies established by them or in pursuance of their provisions.

The law of every modern politically organized society, or State, conceives the State itself as a legal entity possessing an ultimate and complete power of control over those within the range of its physical power. This internal sovereignty is exercised by governmental agencies that are organized and function in accordance with laws enacted for those purposes. The people of the United States constitute such a State, and the body of law under which it is governed consists of the Constitution of the United States, the constitutions of the separate states, and legislation of various kinds enacted in accordance therewith. The federal Constitution consists in part of provisions that lay down the broad general principles for the structure and functioning of the federal government, and in part of provisions

that limit the structure and functioning of the separate states and their governments. The constitution of each of the separate states lays down the broad general principles for the structure and functioning of its own government only. The provisions of all these constitutions that are of primary importance in these respects are those establishing the several governmental organs, those that confer upon those organs their respective shares of the people's sovereign powers, and those that prescribe the methods for, and the limitations upon, their exercise of those powers. It is those provisions that comprise the really important and fundamental features of the constitutions of our system. There is, however, no legal requirement limiting the content of constitutions to matters of such fundamental character, and many of our state constitutions contain provisions which sound governmental theory would require to be included only in the body of ordinary legislation. This factor renders it practically impossible to formulate a definition of a constitution, that would adequately describe the actual constitutions of our legal system, in terms of the subject matter contained therein.

It is an essential element in our legal theory that a constitution is an act of lawmaking by the people in whom is vested the sovereignty of the State of whose legal system such constitution is an integral part.¹ It is not this factor, however, that gives a constitution its character as fundamental law since there are states whose constitutions make provision for the direct participation of the people in the enactment of ordinary legislation through the devices of the initiative and referendum. The specific factor that gives a constitution that character is its legal status in the legal system of which it is a part. Its legal status is that it is the supreme law of the State to whose legal system it belongs. The federal Constitution specifically declares itself to be "the supreme law of the land",² and each state constitution is the supreme law of such state within the limits permitted by the federal Constitution. The essence of that supremacy does not consist in the possession by a constitution of legal force superior to that enjoyed by the valid provisions of ordinary leg-

¹ *MARBURY v. MADISON*, 1 Cranch 137, 2 L.Ed. 60, Black's Cas. Constitutional Law, 2d 9; *MARTIN v. HUNTER'S LESSEE*, 1 Wheat. 304, 4 L.Ed. 97, Black's Cas. Constitutional Law, 2d 3; *VAN HORNE'S LESSEE v. DORRANCE*, 2 Dall. 304, 1 L.Ed. 391, Black's Cas. Constitutional Law, 2d 1.

² U.S.C.A.Const., Art. VI.

islation or the valid acts of any governmental department existing in accordance with such constitution. The valid provisions of a statute are as much a measure of the legality of the conduct to which they relate as are the provisions of a constitution, and a court is required in the decision of cases before it to recognize the former as law to the same extent as it is required to recognize the latter as such. It is only when the enforcement or application of the statutory rule would involve the violation of a constitutional provision that its legal force is nil and that a court ignores it as furnishing a legal rule for the decision of the case before it. There have been exceptional situations in which courts have in effect ignored valid statutory provisions in their decision of cases before them, and others in which invalid provisions have been treated as factors in the decision of cases. Their general practice has, however, followed lines consistent with the above analysis of the legal force of valid and invalid statutory provisions. The supremacy of a constitution may accordingly be said to consist primarily in that it is the ultimate measure of the legality of the acts of the legislature and the other departments of government established by it or in pursuance of and in accordance with its provisions. This is true even of those parts of a constitution that are judicially non-enforceable.³ Such non-enforceability affects only the method for securing constitutional supremacy, but not its existence. A constitutional provision directly regulating the conduct of the members of a State functions in the same manner and in addition as the ultimate test of legality within the sphere of individual conduct included within its terms.

FUNCTIONS OF CONSTITUTIONS IN OUR GOVERNMENTAL SYSTEM

5. The constitutions of our system constitute legal devices through which the ultimately sovereign peoples postulated by them have limited their exercise of their sovereignty by the legal rules imposed thereon by the provisions of those constitutions.
6. Those constitutions have not established areas of permanent immunity from governmental control since the existing distribution of sovereign powers and limitations thereon can be legally changed or abolished through exercising the power of amendment expressly or impliedly provided for in those constitutions.

³ See on this subject W. F. Dodd, of Constitutions. 80 U. of Pa.L.Rev. 54.
Judicially Non-Enforceable Provisions

7. The federal Constitution contains some provisions that constitute grants of portions of the people's sovereign powers to the government established by it, and other provisions that constitute limitations on the exercise of those delegated powers or those reserved to the states.
8. A state constitution contains some provisions that constitute grants to the governmental agencies established thereby of parts of those sovereign powers of the people of the United States which the people of the state are permitted to exercise under the federal Constitution, and other provisions that constitute limitations on the exercise of those powers by such agencies.

The existence of the constitutions of our system involves some important legal consequences. The Constitution of the United States is a legal device by which the ultimately sovereign people postulated by it have limited themselves by law in respect of the methods of exercising their sovereign powers. The distribution of those powers between the federal government and the several states effected by it implies that the former alone must exercise those portions of the people's sovereignty conferred upon it, and the latter those portions thereof not conferred upon the former except insofar as some of it may have been retained by the people themselves. The distribution of governmental powers among the various departments of government effected by our constitutions confines the exercise of those powers to the department upon which they have been expressly or impliedly conferred. The legal assumption that sovereignty is ultimately vested in the people affords no legal basis for the direct exercise by the people of any sovereign power whose direct exercise by them has not been expressly or impliedly reserved. Thus the people possess the power of legislating directly only if their constitution so provides, and their exercise of such power when provided for is subject to the constitutional limitations on acts of the representative legislative body unless the applicable constitutional provisions provide otherwise.⁴ It is also the generally accepted rule that a constitution can be amended only by a method expressly or impliedly permitted by that constitution.⁵ The federal Constitution is thus a legal device by

⁴ Opinions of the Justices, 160 Mass. 586, 36 N.E. 488, 23 L.R.A. 113; *People ex rel. v. Barnett*, 344 Ill. 62, 176 N.E. 108, 76 A.L.R. 1044.

⁵ *Ellingham v. Dye*, 178 Ind. 336, 99 N.E. 1, Ann.Cas.1915C, 200; *McBee v. Brady*, 15 Idaho 761, 100 P. 97; *Koehler v. Hill*, 60 Iowa 543, 14 N.W. 738, 15 N.W. 609.

which the people of the United States have limited the exercise of their sovereignty in the manner provided therein, and the state constitutions are legal devices by which the people of the several states have limited their exercise of so much of the sovereignty of the people of the United States as the federal Constitution permits them to exercise through their respective states.⁶

The limitations imposed on the exercise of the people's ultimate sovereignty under our existing constitutional system can be modified, or even completely removed, by legal methods permitted or provided for by the various constitutions that compose it. This can be accomplished through exercising the power of amendment which is generally expressly provided for, but which courts have found to exist even where the constitution contained no express provision therefor.⁷ The view that the methods of amendment provided for by a constitution are exclusive restricts the methods through which the existing limitations can be altered or removed,⁸ but does not prevent their alteration or removal. The only assumption on which the exercise of the amending power would be inadequate to accomplish those results would be the existence of express or implied limits on the subject matter of amendments. It has been several times contended that the power of amending the federal Constitution was thus limited, but the Supreme Court has thus far rejected every such claim,⁹ although at least one state court has subjected the power of amending the state constitution to an implied limit in this respect.¹⁰ The former position is clearly the more reasonable, since the latter implies that the ultimately sovereign people have inferentially deprived themselves of that portion of their sovereign power, once possessed by them, of determining the content of their own fundamental law. There has been found no case in which the power to amend has been employed to di-

⁶ DODGE v. WOOLSEY, 18 How. 331, 15 L.Ed. 401, Black's Cas. Constitutional Law, 2d 4.

⁷ See Wood's Appeal, 75 Pa. 59; State v. American Sugar Ref. Co., 137 La. 407, 68 So. 742.

⁸ See cases cited in footnote 5, supra.

⁹ Rhode Island v. Palmer, 253 U.S. 350, 40 S.Ct. 486, 588, 64 L.Ed. 946;

Leser v. Garnett, 258 U.S. 130, 42 S. Ct. 217, 66 L.Ed. 505. See D. O. McGovney, Is the Eighteenth Amendment Void Because of its Contents? 20 Col.L.Rev. 499; W. L. Marbury, The Limitations Upon the Amending Power. 33 Harv.L.Rev. 223.

¹⁰ State ex rel. Halliburton v. Roach, 230 Mo. 408, 130 S.W. 689, 139 Am.St.Rep. 639.

rectly or indirectly modify a constitutional provision expressly excepted from that power. The issues that such an attempt would raise could not be settled by any reasoning derived by logical processes from prevailing conceptions of sovereignty, and those based on considerations of convenience and expediency point to the solution that such attempts to limit the power of amendment should be held futile. The necessities of orderly government do not require that one generation should be permitted to permanently fetter all future generations.

There are found in all of our constitutions provisions that constitute grants of power to designated governmental organs. This is as true of the constitutions of the several states as it is of that of the United States. The latter created a new politically organized society composed of the people of the United States, and established a system of government for it. The federal government and the separate states and their peoples constitute its governmental organs, and the latter exercise a part of the sovereignty of the people of the United States as well as does the former.¹¹ The federal government may exercise only such part of that sovereignty as has been expressly or impliedly conferred upon its several departments by the provisions that establish them and define their powers. The states and their peoples owe their legal existence as elements in the governmental structure of the United States solely to the federal Constitution, and it alone is the legal source of their power to exercise a part of the sovereignty of the people of the United States. The extent of such power which they are permitted to exercise is defined by the principle that it includes such part thereof as has not been delegated to the federal government, prohibited to the states, or reserved to the people. The form in which the principle is stated does not affect its character as in effect a grant of power made to them by the federal Constitution, although usually described as a reservation of power to them. That Constitution has left it to the people of each state to determine the governmental system under which such state and its people shall exercise that part of the sovereignty of the people of the United States which the federal Constitution has conferred upon it and them, subject only to such limitations on their form of government as that Constitution itself has prescribed. The people of each state have exercised that power by adopting a state con-

¹¹ *LANE COUNTY v. OREGON*, 7 Wall. 71, 19 L.Ed. 101, Black's Cas. Constitutional Law, 2d 6.

stitution which invariably contains provisions establishing state governmental organs that are to exercise the part of the sovereignty of the people of the United States which the federal Constitution permits that people to exercise. Those provisions are as much grants of power as are the corresponding provisions of the federal Constitution. The courts in construing the scope of the powers conferred upon those state governmental organs do so on the assumption that the people of each state intended to confer upon them the full extent of such powers possessed by that people under the distribution of the sovereignty of the people of the United States effected by the federal Constitution.¹² The courts in construing the scope of the grants of power to the several organs of the federal government by the federal Constitution do so on the assumption that the people of the United States intended to confer upon them only such powers as can be derived from the terms of the express grants of power made to them in that Constitution. It is this difference in the approach to the judicial construction of the grants of power made by the state and federal constitutions that is indicated by the statements that the former are limitations upon, while the latter is a grant of, power. An important result of this difference has been that the emphasis in decisions involving the constitutionality of state action has been on the limitations thereon, while in those involving the validity of federal governmental action it has as often been on the existence of the power to do the questioned act as on the limitations specifically aimed at the exercise of admitted powers.

There are also found in all of our constitutions provisions imposing limitations upon the exercise of the powers conferred by other provisions thereof. These are sometimes implied, but more often expressed. The federal Constitution contains limitations upon both the federal government and the states and their governmental organs. The limitations found in the constitution of each state restrict action by its own governmental organs only. A considerable part of our constitutional law consists of judicial decisions construing the scope of such limitations. The fact that many of these limitations were intended to protect certain individual interests from undue interference by governmental action has at times led even courts to view those interests as a

¹² *People v. Flagg*, 46 N.Y. 401; *Chicago, B. & Q. R. Co. v. County of Otoe*, 16 Wall. 687, 21 L.Ed. 375; *STATE EX REL. ATTORNEY GEN-*

ERAL v. STATE BOARD OF EQUALIZATION, 56 Mont. 413, 185 P. 703, 186 P. 697, *Black's Cas. Constitutional Law*, 2d 6.

system of natural rights existing independently of the legal system that protects them. Constitutional law is not concerned with their existence as such system of natural rights but only with the extent to which they have obtained legal recognition and protection in the several constitutions of our system. The theory has, however, been a significant factor in the judicial construction of some of the most important limitations found in our constitutions.

The proper formulation of the principles of the constitutional law under which the people of the United States are governed requires recognition of the fact that the whole body of none of our constitutions is either a grant of powers or a limitation on powers, but that all of them contain some provisions that are grants of power and other provisions imposing limitations on the exercise of such powers. The difference in the interpretative technique employed in defining the scope of the grants of power made by the federal Constitution and the constitutions of the several states should not obscure the fundamental features common to both

ENFORCEMENT OF CONSTITUTIONS AS LAW

9. The power and duty of enforcing our constitutions as part of the law of the land has been conferred by them upon the judicial departments of the United States and the several states.

The provisions of our constitutions that confer powers upon and prescribe the manner of, and the limitation upon, their exercise by the various governmental departments constitute law that is binding upon those departments.¹³ The duty of insuring that those departments shall observe the constitutional provisions applicable to them rests almost wholly upon the judicial department. The several constitutions might have adopted a different system for securing government according to their provisions, and, had they done so, constitutional government would not thereby have been rendered impossible. A statute declared unconstitutional by a court would be constitutional if re-enacted by a popular vote under a constitution so providing. The concept of "constitutionality" is a purely formal one denoting congruence with constitutional requirements, and such congruence

¹³ *MARBURY v. MADISON*, 1 Cranch 137, 2 L.Ed. 60, Black's Cas. Constitutional Law, 2d 9.

is not dependent upon having its existence ultimately determined in any particular manner or by courts only. A system in which the final determination of constitutional issues was entrusted, in whole or in part, to other governmental agencies than the courts would differ widely from our own, but would not on that account cease to be a constitutional government. It is impossible under any system to avoid entrusting the ultimate decision of constitutional issues to a governmental agency whose members must perforce decide on the basis of their own judgment as to the meaning of the relevant constitutional provisions, and that is true whether the decision of all such issues is entrusted to a single agency or the decision of different classes of such issues is distributed among more than one agency. The system of judicial review itself necessarily involves the result that the constitutional limitations on the judicial department be defined by a process of judicial self-limitation.¹⁴ This alone furnishes no reason for claiming that the system is arbitrary, or that the constitutional provisions themselves constitute an unimportant factor in the process. It does, however, imply that no system constitutes a mechanical device for insuring government in accordance with constitutional provisions.

ENFORCEMENT OF CONSTITUTIONS IN OUR FEDERAL SYSTEM

10. Every federal and every state court has the power and duty to decide an issue of either federal or state constitutional law necessary to the disposition of a case properly before it.
11. State courts are bound by the decisions of federal courts on points of federal constitutional law.
12. The decisions of a state court interpreting that state's constitution are binding on the federal courts.

The legal basis for the judicial review of the constitutionality of the acts of other governmental departments is that our constitutions, as interpreted by the courts, have conferred that power upon them as an incident to the grant to them of the judicial power of the United States or the states. Their exercise of this power has at times been charged to constitute an act of usurpation, but the better opinion sustains the contrary view. It is

¹⁴ See remarks of Mr. Justice Stone in his dissenting opinion in *UNITED STATES v. BUTLER*, 297 U.S. 1, 56

S.Ct. 312, 80 L.Ed. 477, 102 A.L.R. 914, Black's Cas. Constitutional Law, 2d 17.

now so firmly established that only constitutional amendments could remove it from our system of constitutional law. The constitutions of some of the states expressly recognize the power of the courts to determine the constitutionality of legislation. The federal Constitution has conferred a part of the judicial power of the people of the United States upon the courts whose establishment is provided for by it, while the remainder thereof is left by it to be conferred upon such state courts as may be provided for by the various state constitutions. The power of the courts of each of those systems to decide cases within the scope of their respective jurisdictions extends to the decision of every legal issue necessary to the disposition of any case properly before any court of such systems. A federal court may, and, when the case cannot be otherwise disposed of, must determine issues of both federal and state constitutional law involved in cases properly before it.¹⁵ The extent of a state court's power and duty in such a case is the same.¹⁶ The specific provision of the federal Constitution that makes it binding upon state judges despite anything to the contrary in state constitutions or laws recognizes that the judicial power of the states includes that of passing on federal constitutional issues whenever such arise in cases within the jurisdiction of state courts as defined by the respective state constitutions.¹⁷ Federal courts frequently decide issues of state constitutional law, and state courts decide questions of federal constitutional law involving both state action and action by the federal government.¹⁸

The fact that federal courts may and must decide state constitutional issues if necessary to the decision of cases before them does not mean that the ultimate determination of the meaning of state constitutions rests with them. Their decisions on such matters are often final as far as the specific cases are concerned in which they are made, since there has never existed any method for the review of decisions of federal courts on such matters by state courts. The principles that define the inter-relations among the various courts of the system of federal courts would require a federal court to accept the decision on such question

¹⁵ See discussion in *MARTIN v. HUNTER'S LESSEE*, 1 Wheat. 304, 4 L.Ed. 97, Black's Cas. Constitutional Law, 2d 3. See also *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 53 S.Ct. 431, 77 L.Ed. 1015.

¹⁶ See *Lent v. Tillson*, 140 U.S. 316,

11 S.Ct. 825, 35 L.Ed. 419; *State ex rel. Wynne v. Lee*, Judge, 106 La. 400, 31 So. 14.

¹⁷ U.S.C.A.Const., Art. VI

¹⁸ See cases cited in footnotes 15 and 16, *supra*.

of another federal court by whose decisions the former was bound. The decision of no federal court on such an issue would bind the courts of the state whose constitution was being construed, nor the courts of any other state. The federal Constitution has established a federal system under which each state is permitted, subject to certain limitations contained in that Constitution, to adopt such constitution as its people may determine. It is more consistent with the fundamental political ideas underlying that system to permit the final determination of what state governmental acts conform to state constitutional requirements to be made by a state agency than by a federal authority. The federal courts accordingly regard themselves as bound by the construction of a state constitution adopted by the court which under that state's constitution is finally empowered to pass thereon, at least so far as that constitution confers that power on any of its courts.¹⁹ The theory on which this position is based would require the same effect to be given to the decisions of any court of that state so far as its constitution embodies the theory of judicial supremacy, but in practice this is not always done. It would also require federal courts to accept the decision on such a question of any state agency upon which the state constitution had conferred that power, whether or not that agency were a part of the state's judicial system, and it is practically certain that they will do so if such an occasion should ever arise.

The power and duty of state courts to decide issues of federal constitutional law does not imply that the ultimate determination of such issues lies with them. The duty of the judges of state courts to treat the federal Constitution and the laws enacted in pursuance thereof as the supreme law of the land despite anything to the contrary in the constitution or laws of their state would justify and require the judges of inferior state courts to ignore the decisions of the state's superior courts on such issues, since no state constitution or statute would be valid that required the lower court to follow an erroneous construction of the federal Constitution by the state's superior courts. The practice, however, is otherwise. The same considerations that require federal courts to follow those interpretations of a state constitution that that constitution makes authoritative and final, demand that state courts follow those interpretations of the federal Constitution to which it gives those qualities. The decisions of the United States Supreme Court on the meaning of the fed-

¹⁹ *Terrace v. Thompson*, 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255.

eral Constitution are binding upon all state courts. The decisions of the lower federal courts on such issues should have the same effect, and in general are accorded it by state courts. The determinations of other federal agencies on matters within their power of ultimate decision under the federal Constitution are equally binding upon state courts and other state agencies. Thus the decision of the federal government's executive department on the *de jure* character and recognition of a foreign government binds the state court in a case whose disposition depends on that factor.²⁰

The legal situation in this matter may be summarized as follows:

1. Every federal and every state court has the power and duty of deciding federal or state constitutional issues necessary to the disposition of any case properly before it.

2. A federal court can and must in such case reach its own independent conclusion on an issue of state constitutional law if it has not theretofore been determined by the courts, or other state organ, to which that state's constitution gives the final decision thereon. A federal court is bound by the action of such state court, or other state agency, on such point.

3. A state court can and must do the same in respect of issues of federal constitutional law, but is bound by the decision thereon of a federal court, or other federal agency to which the federal Constitution has given ultimate power of decision thereon.

CONSTRUCTION AND INTERPRETATION OF CONSTITUTIONS

13. The judicial process of enforcing a constitution is in form one of interpreting a written instrument.
14. Principles developed to aid in interpreting other written instruments are relevant, but their force is affected by the consideration that it is a constitution that is being interpreted.
15. There is a presumption in favor of the constitutionality of a legislative act, and it will be held unconstitutional only if its invalidity is clear.

²⁰ Russian Socialist Federated Soviet Republic v. Cibrario, 235 N.Y. 255, 139 N.E. 259.

16. The constitution must be so construed as to give effect to the intention of those who adopted it, but the language used by them is the most important factor in determining that intention.
17. Extraneous aids, such as convention debates, contemporaneous construction, and practical construction, may be resorted to to resolve, but not to create, ambiguities.
18. The principles of interpretation are employed by courts as guides in ascertaining the meaning of constitutional provisions, but are not treated by them as rigid and inflexible rules.

The courts exercise their power of reviewing the constitutionality of the acts of the other departments most frequently in passing on the validity of legislation. This is principally because our constitutions confer few powers upon the executive department capable of exercise by it without legislative action, and because most of its independent powers are either incapable of practical judicial enforcement or of such character that an intention to have their exercise immune from judicial review is fairly inferable from the constitutions themselves. It would be wholly impracticable for courts to attempt to enforce the constitutional provision that the President shall receive ambassadors and other public ministers, and it is equally clear that it was never intended that courts should substitute their judgment for the President's in his exercise of his power to adjourn both houses of Congress, in case of disagreement between them as to the time of adjournment, until such time as he shall think proper. The refusal of courts to decide political questions, and in some jurisdictions to control the action of the principal executive officers by mandamus or injunction, create spheres of executive immunity from judicial control, although even here the theory of judicial supremacy is maintained since the courts define the scope of these self-imposed restrictions on their power. Executive officers are frequently parties to cases in which constitutional issues are decided, but the decisions generally concern the validity of the statutes under which they purport to act. The bulk of our constitutional law consists of decisions defining the area of valid legislative action.

The judicial process of enforcing our constitutions is, due to the fact that all of them are written constitutions, in form that of construing the meaning of a written instrument. The general principles employed in interpreting other written instruments are relevant, but their application is tempered by certain more

fundamental considerations. There is a presumption in favor of the constitutionality of an act of the legislature.²¹ This is based in some instances on the respect due to acts of a coordinate branch of the government. A federal court deciding on the constitutionality of an Act of Congress, and a state court deciding on the validity of an act of a state legislature under the state constitution, are passing on acts of coordinate branches of their respective governments. The scope of the presumption is broader than this principle requires. It is applied by a federal court in determining whether a state statute violates one of the express limitations on state action contained in the federal Constitution,²² and has been invoked by state courts in passing on similar issues.²³ There are even stronger reasons for giving effect to the presumption when a federal court passes on the validity of a state statute under a state constitution, or a state court passes on the validity of a federal statute. The presumption is seldom explicitly relied on when the issue is whether a state statute lies within the powers reserved to the states under the federal Constitution. The presumption is the basis for the rule that a court will invalidate a legislative act only if its repugnance to constitutional requirements is clear.

The judicial duty in passing on the constitutionality of legislation is to determine its conformity to constitutional requirements. The purpose is to ascertain the intention of the people from whom the constitution emanated. The most important single factor in determining that intention is the language in which it is expressed.²⁴ The words employed are to be taken in their natural sense, except that legal or technical terms are to be given their technical meaning.²⁵ The imperfections of language as a vehicle for conveying meanings result in ambiguities that must be resolved by resort to extraneous aids for discovering the intent of the framers. Among the more important of these are a consideration of the history of the times when the provision was adopted and of the purposes aimed at in its adoption.²⁶ The debates of constitutional conventions, contemporaneous construc-

²¹ *United States v. Fox*, 95 U.S. 670, 24 L.Ed. 538; *Green v. Frazier*, 253 U.S. 233, 40 S.Ct. 499, 64 L.Ed. 878.

²² *Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205.

²³ *Reed v. Bjornson*, 191 Minn. 254, 253 N.W. 102.

²⁴ *Ogden v. Saunders*, 12 Wheat. 213, 6 L.Ed. 606.

²⁵ *Smith v. Alabama*, 124 U.S. 465, 8 S.Ct. 564, 31 L.Ed. 508; *United States v. Wong Kim Ark*, 169 U.S. 649, 18 S.Ct. 456, 42 L.Ed. 890.

²⁶ *Prigg v. Pennsylvania*, 16 Pet. 539, 10 L.Ed. 1060; *Maxwell v. Dow*,

tion, and practical construction by the legislative and executive departments, especially if long continued, may be resorted to to resolve, but not to create, ambiguities.²⁷ If a provision that has received a settled judicial construction is adopted from another constitution, there is a presumption that the construction thereof was also adopted, but there is no binding rule requiring this.²⁸ Consideration of the consequences flowing from alternative constructions of doubtful provisions constitutes an important interpretative device. The tendency to treat provisions as prospective rather than retroactive, and to treat those governing the formalities of the legislative and amending processes as directory rather than mandatory, or, if deemed mandatory, as satisfied by substantial compliance therewith, show the influence of this principle. A statute may not be held invalid merely because it conflicts with the spirit of the constitution, but the general purposes and objectives aimed at by the establishment of a constitution or the adoption of a provision may be considered. The purposes of many of the broadly phrased constitutional limitations were the promotion of policies that do not lend themselves to definite and specific formulation. The courts have had to define those policies and have often drawn on natural law and natural rights theories in doing so. The interpretative value of these general philosophical ideas is not as great as it formerly was. The interpretation of constitutions tends to respond to changing conceptions of political and social values. The extent to which these extraneous aids affect the judicial construction of constitutions cannot be formulated in precise rules, but their influence cannot be ignored in describing the essentials of the process. No rules or principles have yet been formulated that have reduced the process to a purely mechanical one. A rule may be employed in one instance and rejected in another. The principles of interpretation guide courts, but do not dictate solutions. There remains in many instances a field within which the judicial discretion has not yet rigidly bound itself by formal rules.²⁹

176 U.S. 581, 20 S.Ct. 448, 494, 44 L.Ed. 597.

McIntyre v. State, 170 Ind. 163, 83 N.E. 1005.

²⁷ People v. Stevenson, 281 Ill. 17, 117 N.E. 747; Fairbank v. United States, 181 U.S. 283, 21 S.Ct. 648, 45 L.Ed. 862.

²⁸ Ludlow-Saylor Wire Co. v. Wollbrinck, 275 Mo. 339, 205 S.W. 196;

²⁹ The opinions in the following cases contain discussions indicative of the varying approaches to this type of problem: SHARPLESS v. MAYOR OF CITY OF PHILADELPHIA, 21 Pa. 147, 59 Am.Dec. 759, Black's Cas. Constitutional Law, 2d

BURDENING AND REGULATING JUDICIAL REVIEW

19. The right to judicial review may not be so burdened as to erect an unfair barrier against an honest litigant's attempt to obtain a judicial determination of his constitutional rights.
20. The state may within limits regulate the exercise of judicial review by its courts.

Judicial review, particularly of legislation, has been subjected to frequent criticisms, and efforts have been made to limit it. Legislatures have frequently sought to deter those affected by a statute from testing its validity through the imposition of severe penalties that would be incurred if the legislation should be sustained. Their imposition in connection with rate statutes or orders has been held to so unreasonably burden the right to have the validity of rates judicially determined as to deprive those required to observe those rates of due process of law regardless of the validity of the rates,³⁰ but this principle does not give persons under all circumstances the privilege of disobeying a statute at least once in order that its validity may be judicially tested.³¹ States have also attempted to control the exercise of judicial review by constitutional provisions requiring more than a majority of the court to agree on the invalidity of a statute in order to invalidate it. No provision of the federal Constitution prevents a state from adopting that system for determining the validity of state statutes under the state constitution,³² and a state court has made a like holding where the issue was the validity of a state statute under the federal Constitution.³³ The provision of the Constitution making it the supreme law of the land binding upon state judges renders invalid

13; *UNITED STATES v. BUTLER*, 297 U.S. 1, 56 S.Ct. 312, 80 L.Ed. 477, 102 A.L.R. 914, Black's Cas. Constitutional Law, 2d 17; *WEST COAST HOTEL CO. v. PARRISH*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703, 108 A.L.R. 1330, Black's Cas. Constitutional Law, 2d 18; *BORG-NIS v. FALK CO.*, 147 Wis. 327, 133 N.W. 209, L.R.A., N.S., 489, Black's Cas. Constitutional Law, 2d 21.

³⁰ *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714, 13 L.R.A., N.S., 932, 14 Ann.Cas. 764; *OKLA-*

HOMA OPERATING CO. v. LOVE, 252 U.S. 331, 40 S.Ct. 338, 64 L.Ed. 596, Black's Cas. Constitutional Law, 2d 23.

³¹ *Life & Cas. Ins. Co. v. McCray*, 291 U.S. 566, 54 S.Ct. 482, 78 L.Ed. 987.

³² *Ohio ex rel. Bryant v. Akron Metropolitan Park Dist.*, 281 U.S. 74, 50 S.Ct. 228, 74 L.Ed. 710, 66 A.L.R. 1460.

³³ *De Witt v. State ex rel. Crabbe*, 108 Ohio St. 513, 141 N.E. 551.

a state constitutional provision making a state statute held to violate the federal Constitution effective upon reenactment thereafter by popular vote.³⁴ It has been held that a state constitutional provision withdrawing from all state courts except its supreme court the power to pass on state constitutional questions violated the due process clause of the 14th Amendment to the federal Constitution, and that, therefore, a state constitutional provision accomplishing that result through permitting the popular recall of judicial decisions on such matters was equally violative thereof.³⁵

³⁴ *People v. Western Union Tel. Co.*, 70 Colo. 90, 198 P. 146, 15 A.L.R. 326.

³⁵ *People v. Max*, 70 Colo. 100, 198 P. 150.

CHAPTER 2

THEORY AND PRACTICE OF JUDICIAL REVIEW

- 21. Theory of Judicial Review.
- 22-26. Interest Requisite to Existence of a Case.
- 27-30. Interest Requisite to Raising Constitutional Issue.
- 31. Actions Prematurely Brought.
- 32-36. Legal Effect of an Unconstitutional Statute.
- 37. Changes in Judicial Decision.
- 38. Curative Acts.
- 39-41. Effect of Partial Invalidity.
- 42. Stare Decisis in Constitutional Law.

THEORY OF JUDICIAL REVIEW

- 21. Courts pass on the constitutionality of statutes only as part of the determination of the law to be applied in deciding cases properly before them.

Courts enforce constitutions only as a necessary concomitant of their power to hear and dispose of a case or controversy before them, to the determination of which must be brought the test and measure of the law.¹ It is essential to the existence of a case that the party invoking judicial aid establish that one or more of his legally protected interests has sustained, or is in immediate danger of sustaining, direct legal injury through the conduct of those against whom he seeks relief. It is now possible in many jurisdictions to test the constitutionality of laws in declaratory judgment proceedings. It is, however, necessary even in such proceedings that the party invoking judicial aid do so on behalf of constitutionally protected interests.² Courts lack jurisdiction to pass on the adverse legal claims of parties, whether based on statute or constitution, unless the party seeking relief can show such requisite interest. The right to invoke judicial aid to enforce or protect a constitutional right thus depends in the first instance on proof that the constitution has conferred such right on the person seeking to enforce or protect it through judicial action.

¹ *Adkins v. Children's Hospital of District of Columbia*, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785, 24 A.L.R. 1238.

² See for discussion of declaratory judgment proceedings Chapter 3, Section 50.

INTEREST REQUISITE TO EXISTENCE OF A CASE

22. There is a case when there exists a bona fide dispute between parties asserting adverse legal claims in such form as to render them capable of judicial determination by such regular proceedings as are established by law for the protection or enforcement of rights, or the prevention, redress or punishment of wrongs.
23. The interest which a citizen shares in common with all other citizens to be governed in accordance with the constitution will not support a suit by him to test the constitutionality of governmental acts.
24. The interest of one of the states in preventing federal encroachment on its reserved powers is insufficient to support a suit by it to test the validity of federal acts.
25. A state may sue to protect its property and quasi-sovereign interests against injury from invalid federal action.
26. A person may sue to protect his interests of person and property against direct injury thereto through unconstitutional acts of government.

An interest may be protected by a constitutional provision specifically intended to protect it. The immunity against compulsory self-incrimination is clearly such. There are other interests that derive an indirect protection from constitutional provisions primarily intended to protect other interests. Thus the immunity of the instrumentalities of the federal government from state taxation is the basis of the taxpayer's constitutionally protected interest to be immune from state taxes violating that provision. A state tax contravening that principle involves a legal injury to such taxpayer only because that principle confers on him a constitutionally protected interest. The interest which a person possesses in common with every other citizen to have government administered in accordance with the constitution will not support a proceeding by him to insure that result.³ Every taxpayer has a clear factual interest in preventing a waste of public funds, but his legal right to enjoin, or otherwise judicially test, public expenditures authorized under an unconstitutional statute or as an incident to an unconstitutional procedure has received but limited recognition. He may do so in

³ FAIRCHILD v. HUGHES, 258 Black's Cas. Constitutional Law, 2d U.S. 126, 42 S.Ct. 274, 66 L.Ed. 499, 27.

the case of municipal expenditures,⁴ and in some states as to state expenditures.⁵ A federal taxpayer's interest in the expenditure of federal funds has, however, been held too minute, uncertain and remote to entitle it to judicial protection.⁶ The theory on which the existence of the requisite interest is denied in these cases would prevent the taxpayer from questioning the validity of the expenditures even in a suit to recover such portion of general taxes paid by him as had been expended for unconstitutional purposes, or by way of defense to a suit by the public to collect such portion of such taxes. So far as the denial of the taxpayer's right to raise the issue is based on the resulting interference with the administration of government, the principle would require its denial even where the proceeds of a specific tax were appropriated to an unconstitutional use. A federal taxpayer has, however, been permitted to question the constitutionality of the use of federal funds derived from a tax imposed upon him, whose proceeds were specifically appropriated to that use, where that use was the principal factor in establishing that the purpose of the levy was not revenue but the regulation of activities beyond the power of the federal government to regulate.⁷ The levy was held invalid on that ground, but the decision leaves unimpaired the prior rule that denies a federal taxpayer as such the right to question the validity of appropriations of federal funds raised or to be raised by valid exercises of the federal taxing power.

The federal Constitution recognizes the legal existence of the separate states and reserves to them a limited field of sovereign powers. A state's interest in preventing federal encroachment on its reserved powers will not alone entitle it to a judicial determination of the constitutionality of federal action alleged to invade it.⁸ It has no standing as *parens patriae* of its citizens as federal taxpayers,⁹ but may appear in that capacity on be-

⁴ *Crampton v. Zabriskie*, 101 U.S. 601, 25 L.Ed. 1070.

1, 56 S.Ct. 312, 80 L.Ed. 477, 102 A.L.R. 914.

⁵ *Burke v. Snively*, 208 Ill. 328, 70 N.E. 327; *Ellingham v. Dye*, 178 Ind. 336, 99 N.E. 1, Ann.Cas.1915C, 200. See *Asplund v. Hamnett*, 31 N.M. 641, 249 P. 1074, 58 A.L.R. 573, *contra*.

⁸ *MASSACHUSETTS v. MELLON*, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078, Black's Cas. Constitutional Law, 2d 26; *Florida v. Mellon*, 273 U.S. 12, 47 S.Ct. 265, 71 L.Ed. 511; *Georgia v. Stanton*, 6 Wall. 50, 18 L. Ed. 721.

⁶ *Massachusetts v. Mellon*, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078.

⁹ *MASSACHUSETTS v. MELLON*, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed.

⁷ *United States v. Butler*, 297 U.S.

half of the non-assenting shareholders and creditors of corporations organized under its laws in opposing such corporations' unlawful acts authorized by an Act of Congress.¹⁰ Its interest as the representative of a part of its citizens where the matter involved is one of grave public concern in which it has an interest apart from that of the individuals affected by the act of another state justifies it in seeking a judicial determination of the constitutionality of such act.¹¹ Its quasi-sovereign right to regulate the taking of wild game within its borders will support an action by it to test the validity of federal action interfering therewith.¹² Its interest in the maintenance of a system of quasi-public institutions existing under its statutes, and of the policy sought to be promoted thereby, give it standing in court to repel an assault thereon through alleged invalid federal action.¹³ The exact limits of this doctrine are not yet clearly defined, but it is unlikely to be carried to the extent of giving the state standing to obtain a judicial determination of the constitutionality of every federal action interfering in any degree with every policy that a state may seek to promote through the exercise of its reserved powers. A state has the same right to judicial protection of its proprietary interests against unconstitutional action that a private person has.¹⁴ The interests that permit a state to obtain a judicial determination of constitutional questions equally justify the United States in obtaining such decision, and its rights in that matter are limited in the same general manner as are those of a state.¹⁵

1078, Black's Cas. Constitutional Law, 2d 26.

¹⁰ Hopkins Federal Savings & Loan Ass'n v. Cleary, 296 U.S. 315, 56 S.Ct. 235, 80 L.Ed. 251, 100 A.L.R. 1403.

¹¹ Pennsylvania v. West Virginia, 262 U.S. 553, 43 S.Ct. 658, 67 L.Ed. 1117, 32 A.L.R. 300.

¹² Missouri v. Holland, 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641, 11 A.L.R. 984.

¹³ Hopkins Federal Savings & Loan Ass'n v. Cleary, 296 U.S. 315, 56 S.Ct. 235, 80 L.Ed. 251, 100 A.L.R. 1403.

¹⁴ Texas v. White, 7 Wall. 700, 19 L.Ed. 227; Pennsylvania v. West Virginia, 262 U.S. 553, 43 S.Ct. 658, 67 L.Ed. 1117, 32 A.L.R. 300.

¹⁵ United States v. Utah, 283 U.S. 64, 51 S.Ct. 438, 75 L.Ed. 844; United States v. West Virginia, 295 U.S. 463, 55 S.Ct. 789, 79 L.Ed. 1546.

INTEREST REQUISITE TO RAISING CONSTITUTIONAL ISSUE

27. The constitutionality of a statute will not be decided in a collusive suit.
28. Courts will pass on the constitutionality of a statute only at the instance of a person who has suffered, or is about to suffer, injury through its enforcement against him.
29. Courts will pass on constitutional issues only if necessary to the disposition of the case before them.
30. A person may sometimes be estopped to question the constitutionality of the enforcement of an invalid law against him.

The courts have also developed rules limiting their decision of constitutional issues even in cases that are properly before them. They will not pass on such issues in a collusive suit, nor in a friendly proceeding in which it clearly appears that there is no bona fide and actual assertion of adverse legal claims.¹⁶ The constitutionality of legislation affecting corporations can be determined in suits by shareholders to enjoin corporate submission to unconstitutional demands, and to enjoin public officers from enforcing invalid statutes against corporations.¹⁷ The requisites of a representative suit must, however, be present in such cases. The cases have usually involved statutes imposing burdens on the corporation and penalties for failure to discharge them, but the method has been employed where the statute imposed no obligation on the corporation but merely conferred upon others authority to enter into contractual arrangements with it.¹⁸ The breach of duty owed shareholders consisted in that case in the lack of lawful authority on the part of those with whom the corporation was attempting to deal, and the injury to shareholders was found in losses that might result from entering into a contract with those having no legal authority to make it.

The principle that courts will pass on the constitutionality of a statute only if necessary to the disposition of the case before them has received a wide variety of application. Courts will not

¹⁶ *Chicago & G. T. Ry. Co. v. Wellman*, 143 U.S. 339, 12 S.Ct. 400, 36 L. Ed. 176.

Law, 2d 35; *Dodge v. Woolsey*, 18 How. 331, 15 L.Ed. 401.

¹⁷ *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 15 S.Ct. 673, 39 L. Ed. 759; *Black's Cas. Constitutional*

¹⁸ *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 688.

decide such issue if the case can be disposed of on any other ground.¹⁹ They will decide it only at the instance of a person who has suffered, or is about to suffer, injury through its application against him. The constitutionality of a statute will not be determined in a moot case since its decision would involve no legal consequences for the parties before the court.²⁰ The existence of a sufficient public interest has led a court to ignore the general rule where the circumstances were such that an important constitutional issue might have remained permanently undecided unless decided by it in a case in which its determination could have no effect upon the immediate controversy before it.²¹ Federal courts require the person raising such issue to have something more than an official interest in its decision,²² but there is a conflict among the state decisions on that point.²³ Those courts that decline to permit public officers to question the constitutionality of statutes imposing duties upon them recognize an exception when the rights of the state or the public are involved.²⁴ Public officers may raise such issues with respect to such statutes if action thereunder might subject their persons or property to liability.²⁵ A litigant whose legal position would be the same whether or not a statute were enforced against him may not question its constitutionality.²⁶ Thus a taxpayer whose combined state and federal tax would have been the same even if the state tax were invalid may not question the validity of the state tax statute.²⁷ The application of the statute in such circumstances involves no injury to the person seeking to ques-

¹⁹ *Martin v. People*, 60 Colo. 575, 155 P. 318; *Negaunee Nat. Bank v. Le Beau*, 195 Mich. 502, 161 N.W. 974, L.R.A.1917D, 852.

²⁰ *United States v. Evans*, 213 U.S. 297, 29 S.Ct. 507, 53 L.Ed. 803.

²¹ *Doering v. Swoboda*, 214 Wis. 481, 253 N.W. 657.

²² *Smith v. Indiana*, 191 U.S. 138, 24 S.Ct. 51, 48 L.Ed. 125; *Braxton County Court v. West Virginia*, 208 U.S. 192, 28 S.Ct. 275, 52 L.Ed. 450.

²³ The following cases deny the right: *State ex rel. Clinton Falls Nursery Co. v. Steele County*, 181 Minn. 427, 232 N.W. 737, 71 A.L.R. 1190; *Threadgill v. Cross*, 26 Okl.

403, 109 P. 558, 138 Am.St.Rep. 964. Contra, *Van Horn v. State*, 46 Neb. 62, 64 N.W. 365.

²⁴ *People ex rel. v. Pitcher*, 56 Colo. 343, 138 P. 509; *Mohall Farmers' Elevator Co. v. Hall*, 44 N.D. 430, 176 N.W. 131.

²⁵ *State ex rel. Wiles v. Williams*, 232 Mo. 56, 133 S.W. 1; *Com. v. Mathues*, 210 Pa. 372, 59 A. 961; *State ex rel. University v. Candland*, 36 Utah 406, 104 P. 285, 24 L.R.A., N.S., 1260, 140 Am.St.Rep. 834.

²⁶ *Pugh v. Pugh*, 25 S.D. 7, 124 N.W. 959, 32 L.R.A., N.S., 954.

²⁷ *In re Knowles' Estate*, 295 Pa. 571, 145 A. 797, 63 A.L.R. 1086.

tion its validity. This is also the ultimate basis of the general rule that a person will not be permitted to contest the constitutionality of a statute on the score that it invades another's constitutional rights. Thus an employer may not question the validity of a statute because it deprives his employees of property without due process of law or denies to them the equal protection of the law.²⁸ There are certain constitutional provisions that may be waived by the person for whose protection they were intended. A person who has waived their protection in a given instance may not thereafter raise the issue that his constitutional rights have been infringed in that instance, since whatever injury he may incur is due to his own act rather than to the enforcement of an unconstitutional measure against him.²⁹ A waiver in a given instance will not preclude a person from invoking the protection of such provisions in another instance.

The person whose conduct is directly regulated by a legislative provision sought to be enforced against him may question its constitutionality. A person's rights may, however, be affected by legislation so regulating the conduct of others as to compel them to act in a manner disadvantageous to such person. The constitutionality of such legislation may be contested by the person thus affected if it results in a direct injury to his legally protected interests. An employee has such an interest in the freedom of his employer to exercise his judgment in matters of employment without illegal interference or compulsion, and hence may question the constitutionality of a statute regulating employers whose enforcement would force the discharge of the employee engaged even under a contract terminable at will.³⁰ Private schools have been held to have such interest in possible patrons so as to permit them to question the validity of a statute regulating the right of parents to control the education of their children.³¹ The vendor in a contract for the sale of real property may contest the validity of an ordinance limiting the vendee's use thereof where the vendee's promise was conditioned on being permitted to use the property in a manner prohibited

²⁸ *Erie R. Co. v. Williams*, 233 U. S. 685, 34 S.Ct. 761, 58 L.Ed. 1155, 51 L.R.A.,N.S., 1097; *Jeffrey Mfg. Co. v. Blagg*, 235 U.S. 571, 35 S.Ct. 167, 59 L.Ed. 364.

²⁹ *Powers v. United States*, 223 U. S. 303, 32 S.Ct. 281, 56 L.Ed. 448.

³⁰ *Truax v. Raich*, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131, L.R.A.1916D, 545, Ann.Cas.1917B, 283.

³¹ *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, 39 A.L.R. 468.

by the ordinance.³² In all these cases the legislation produced an unconstitutional invasion of the rights of the party raising the issue through pressure on those with whom he had or might have advantageous relations, but in the last two cases the principal arguments of the court were concerned with the constitutional rights of those to whom the legislative provision in issue directly applied. The unconstitutionality of a legislative provision in respect of one person may thus become a factor in establishing that its enforcement produces an invasion of the constitutional or legal rights of another who is permitted to urge its invalidity in respect of the former in establishing his own case. The directness of the injury is the principal factor determining whether a person has a constitutional or legal right to be protected against having his interests injuriously affected by legislation which exerts pressure on others in their relations with him. The requisite interest is absent where that injury is indirect and remote. It is impossible to draw an exact line between a direct and an indirect injury for this purpose. It is clear that there is no universal constitutional or legal right to be immune from injurious effects resulting from unconstitutional pressures exerted against others. A creditor would not be entitled to question the constitutionality of a tax imposed on his debtor merely because its exaction might impair the latter's ability to pay the claim.

The general rule that denies a person the right to question the constitutionality of an act in respect of its enforcement against others is inapplicable in some situations. The unconstitutionality of a part of a statute sometimes renders the remainder thereof legally inoperative. The persons affected by the remainder are permitted to question the constitutionality of the invalid part even though it does not apply to them, since that is an essential element in establishing that the remainder is legally inoperative as to them.³³ The general rule applies only where the unconstitutionality of a provision in respect of others does not affect its application to those who are attempting to raise the issue.

A person who would otherwise be entitled to raise a constitutional issue is sometimes denied that right because he is estopped

³² *Buchanan v. Warley*, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149, L.R.A. 1918C, 210, Ann.Cas.1918A, 1201.

³³ *State ex rel. Taylor v. Hall*, 129 Neb. 669, 262 N.W. 835.

to do so.³⁴ The factor usually present in these cases is conduct inconsistent with the present assertion of that right,³⁵ or conduct of such character that it would be unjust to others to permit him to avoid liability on constitutional grounds.³⁶ A person may not question the constitutionality of the very provision on which he bases the right claimed to be infringed thereby,³⁷ nor of a provision that is an integral part in its establishment or definition.³⁸ The acceptance of a benefit under one provision of an act does not ordinarily preclude a person from asserting the invalidity of another and severable provision thereof,³⁹ but there are exceptions to this rule.⁴⁰ The promoters of a public improvement have been denied the right to contest the validity of the rule apportioning its cost over the benefitted lands,⁴¹ and a person who has received the benefits of a statute may not thereafter assert its invalidity to defeat the claims of those against whom it has been enforced in his own favor.⁴² A state is estopped to claim that its own statute deprives it of its property without due process of law,⁴³ but it is permitted to assert that its own statute invades rights that its constitution confers upon it.⁴⁴ Prior inconsistent conduct will not, however, preclude a person from asserting the invalidity of an act if under all the circumstances its assertion involves no unfairness or injustice to those against whom it is raised.⁴⁵

³⁴ *State ex rel. Buchanan County v. Imel*, 242 Mo. 293, 146 S.W. 783; *People v. Bunker*, 70 Cal. 212, 214, 11 P. 703.

³⁵ *Pierce Oil Corp. v. Phoenix Refining Co.*, 259 U.S. 125, 42 S.Ct. 440, 66 L.Ed. 855.

³⁶ *Board of Com'rs of Rogers County v. Bristow Battery Co., D.C.*, 28 F.2d 195.

³⁷ *Hurley v. Commission of Fisheries*, 257 U.S. 223, 42 S.Ct. 83, 66 L.Ed. 206.

³⁸ *Pierce Oil Corp. v. Phoenix Refining Co.*, 259 U.S. 125, 42 S.Ct. 440, 66 L.Ed. 855; *Grand Rapids & I. R. Co. v. Osborn*, 193 U.S. 17, 24 S.Ct. 310, 48 L.Ed. 598.

³⁹ *Mojave River Irr. Dist. v. Superior Court of San Bernardino*

County, 202 Cal. 717, 262 P. 724; *Id.*, Cal.App., 256 P. 469.

⁴⁰ *Booth Fisheries Co. v. Industrial Commission of Wisconsin*, 271 U.S. 208, 46 S.Ct. 491, 70 L.Ed. 908.

⁴¹ *Shepard v. Barron*, 194 U.S. 553, 24 S.Ct. 737, 48 L.Ed. 1115.

⁴² *Daniels v. Tearney*, 102 U.S. 415, 26 L.Ed. 187.

⁴³ *Sweeney v. State*, 251 N.Y. 417, 167 N.E. 519.

⁴⁴ *In re Stanford's Estate*, 126 Cal. 112, 54 P. 259, 58 P. 462, 45 L.R.A. 788; *State ex rel. v. Doane*, 98 Kan. 435, 158 P. 38; *Bush v. State ex rel.*, 187 Ind. 339, 119 N.E. 417.

⁴⁵ *O'Brien v. Wheelock*, 184 U.S. 450, 22 S.Ct. 354, 46 L.Ed. 636.

ACTIONS PREMATURELY BROUGHT

31. A court will not pass on a constitutional issue in an action prematurely brought.

The principle that courts protect constitutional rights only against actual or threatened invasion has led them to dismiss actions that are prematurely brought. A person is not required to await the consummation of a threatened injury before invoking judicial aid. He may invoke it if the injury is certainly impending.⁴⁶ The mere enactment of an unconstitutional statute does not ordinarily constitute a sufficient threat of immediate injury to justify judicial interposition, but the existence of such statute may involve consequences of such character that courts will interfere even before a direct attempt at its enforcement occurs.⁴⁷ Thus an action to enjoin the enforcement of a zoning ordinance was entertained even prior to a specific threat of its enforcement against the complainant.⁴⁸ The reason for such decisions is that the very existence of the statute imposes an immediate economic burden or disadvantage upon the complainant in respect of a legally protected interest. That a proposed statute or ordinance would, if enacted, be unconstitutional should not justify a court in interfering with the legislative process. This is the general rule which is supported also by the theory of the separation of powers.⁴⁹ The rule is not always followed. Municipal legislative bodies have been enjoined from enacting ordinances.⁵⁰ The submission of legislation and proposed constitutional amendments to popular approval has frequently been enjoined in taxpayers' actions against public officials charged with duties in those matters where there existed some constitutional defect of form or substance in the proposals to be voted

⁴⁶ *Pennsylvania v. West Virginia*, 262 U.S. 553, 43 S.Ct. 658, 67 L.Ed. 1117, 32 A.L.R. 300.

⁴⁷ *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, 39 A.L.R. 468.

⁴⁸ *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303, 54 A.L.R. 1016.

⁴⁹ *Spies v. Byers*, 287 Ill. 627, 122

N.E. 841; *State v. Osborn*, 16 Ariz. 247, 143 P. 117; *Threadgill v. Cross*, 26 Okl. 403, 109 P. 558, 138 Am.St. Rep. 964; *State ex rel. Cranmer v. Thorson*, 9 S.D. 149, 68 N.W. 202, 33 L.R.A. 582; *Frantz v. Autry*, 18 Okl. 561, 91 P. 193.

⁵⁰ *Roberts v. Louisville*, 92 Ky. 95, 17 S.W. 216, 13 L.R.A. 844; *contra*, *Alpers v. City and County of San Francisco*, C.C., 32 F. 503.

on.⁵¹ These decisions are difficult to reconcile with sound theory, but the method has some practical advantages.

LEGAL EFFECT OF AN UNCONSTITUTIONAL STATUTE

32. A judicial decision invalidating a statute determines only that it cannot be constitutionally applied in the case in which the decision was rendered.
33. A statute that is unconstitutional as applied to a case within its terms is void *ab initio* as applied to such case.
34. A statute void as applied to some cases within its terms may be valid as applied to other cases within them, and a statute void when applied under one set of circumstances may be valid as applied under another set of circumstances.
35. The courts have in some situations given effect to an unconstitutional statute to protect those who have acted in reliance thereon.
36. An unconstitutional statute is sometimes given effect through the operation of certain collateral legal principles.

It is no part of a court's function to exercise a general veto over legislation, but it is its duty to protect persons properly before it against the actual or threatened enforcement against them of the unconstitutional provisions of a statute. Its action in declaring any such provision unconstitutional amounts to little more than exercising "the negative power to disregard an unconstitutional enactment which otherwise would stand in the way of the enforcement of a legal right."⁵² It is an adjudication that the legislative rule cannot be constitutionally applied in the case before the court, and its scope is limited by that consideration. The legislative rule may, and generally does, apply to more than a single case. The factor that makes its application invalid in one case may or may not be present in other cases within the rule. A decision that the rule is unconstitutional as applied to a given case within its terms would determine its unconstitutionality as applied to all cases in which was present the factor that made its application invalid in the given case,

⁵¹ *Ellingham v. Dye*, 178 Ind. 336, 99 N.E. 1, Ann.Cas.1915C, 200; *Livermore v. Waite*, 102 Cal. 113, 36 P. 424, 25 L.R.A. 312; *Holmberg v. Jones*, 7 Idaho 752, 65 P. 563.

⁵² *MASSACHUSETTS v. MEL- LON*, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078, Black's Cas. Constitutional Law, 2d 26.

but would not determine that it could not be validly applied to other cases within the rule in which that invalidating factor was absent. A state statute fixing public utility rates is held to violate the due process clause of the 14th Amendment to the Federal Constitution if it confiscates the property of the utility company. The existence of such confiscation depends on facts that vary from case to case. A decision that the enforcement of the rates in one case produced such confiscation would not prevent their enforcement in another case in which the significant facts failed to establish confiscation.⁵³ A decision that a legislative provision violated an ex post facto clause in a case involving its retrospective application would leave it unaffected in its prospective operation although it would determine its invalidity for every case in which it was sought to give it retrospective operation. It is only when the invalidating factor is necessarily present in every possible case within its terms that a decision in any case will determine the invalidity of the legislative provision in all cases within its terms. There are many instances of this character, but a common one is a decision holding a legislative provision invalid as applied in a given case for an absolute want of power in the legislature to enact it. Thus Section 10 of Article I of the Constitution of the United States absolutely prohibits a state from making any thing but gold and silver coin a tender in payment of debts. A decision in any case invalidating a state statute attempting to make paper money legal tender would determine its invalidity for all cases to which that statute applied, since all would involve the same defect of power.

The scope and effect of a decision sustaining a legislative provision is defined by similar considerations. A decision that it is within the legislative power determines that issue with respect to all similar cases within the terms of such provision, but leaves undetermined the validity of its application to dissimilar cases. A decision that it does not violate a particular constitutional limitation determines that issue for all other cases within its terms in which are present the factors that made its application in the given case valid so far as that limitation is concerned, but would not determine its validity under that limitation for other dissimilar cases nor its validity in any case under other

⁵³ Minnesota Rate Cases, 230 U.S.
352, 33 S.Ct. 729, 57 L.Ed. 1511, 48
L.R.A.,N.S., 1151, Ann.Cas.1916A, 18.

constitutional provisions. Thus a statute that had been held consistent with due process because of the existence of an emergency when enacted and applied in a given case was later held to violate that provision when sought to be applied in a subsequent case after the emergency had passed.⁵⁴

It is not the judicial determination that a legislative provision is unconstitutional in any or all of its applications to the cases within its terms that makes it such since those decisions in theory merely declare the law. The legal status of a legislative provision insofar as its application involves violation of constitutional provisions, must, however, be determined in the light of the theory on which courts ignore it as law in the decision of the cases in which its application produces unconstitutional results. That theory implies that the legislative provision never had legal force as applied to cases within that class. This is true whatever be the constitutional factor that makes its application invalid in those cases. A state statute making paper money legal tender in the payment of debts would lack legal force from the time of its enactment; one that violated an *ex post facto* clause so far as retrospectively applied would be legally ineffective from the time of its enactment as applied to all such cases. This result does not depend upon the judicial determination of the situations in which such legislative provision is inapplicable for constitutional reasons since those merely define the cases in which the provision has that legal status. It sometimes occurs that a statutory provision sustained as valid at one time is subsequently held invalid because of changed circumstances at the time of its later application,⁵⁵ or that such change in circumstances is recognized as invalidating a provision which the court assumes could have been validly applied under the conditions existing at the time of its enactment.⁵⁶ The correct theory is not that the changed circumstances have invalidated an originally valid enactment but rather that from the very time of its enactment it would have been invalid to have applied it under the conditions existing in the case in which it was subsequently declared unconstitutional. The changed circumstances have merely created the situations in which its application is invalid, but it would have been equally invalid to have applied it to those situa-

⁵⁴ *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 44 S.Ct. 405, 68 L.Ed. 841; *Peck v. Fink*, 55 App.D.C. 110, 2 F.2d 912.

⁵⁵ See cases in footnote 54, *supra*.

⁵⁶ *Vigeant v. Postal Telegraph Cable Co.*, 260 Mass. 335, 157 N.E. 651, 53 A.L.R. 867.

tions had they existed when, or immediately after, the provision was enacted. That is, as applied to them, the provision had no legal force from the very time of its enactment. The same reasoning requires the conclusion that a statutory provision is valid from the time of its enactment as applied to all the cases within its terms in which it can at any time be validly applied, and that changed conditions may create such situations even though none existed at the time, or immediately after, it was enacted. The changed conditions considered in this paragraph exclude constitutional changes that might affect the issue, including changes due to reversals of position by the courts.

The theory that a legislative provision, so far as its application involves a violation of a constitutional provision, is without legal force from the time of its enactment, or void *ab initio*, has been judicially formulated in the statement that "An unconstitutional act is not law. It confers no rights; it imposes no duty; it affords no protection; it creates no office. It is, in legal contemplation, as inoperative as though it had never been passed."⁵⁷ This strictly logical view is that generally applied by the courts, although there are numerous decisions refusing to apply it because of the injustice or inconvenience resulting from following it. The void *ab initio* principle is followed whenever courts deny enforcement of rights based on an invalid statute, refuse to enforce duties imposed thereby, or decline to recognize defenses based thereon.⁵⁸ The payment by public officers of tax revenues to a county under an unconstitutional statute confers upon it no right to retain them when sued therefor by a township that would have been entitled to them but for the invalid act.⁵⁹ A municipal corporation created by an unconstitutional statute is generally held to constitute not even a *de facto* corporation, and its existence would invariably be denied in direct proceedings brought to test its right to act as such.⁶⁰ This is also true of private corporations organized under invalid acts.⁶¹ Public of-

⁵⁷ *NORTON v. SHELBY COUNTY*, 118 U.S. 425, 6 S.Ct. 1121, 30 L.Ed. 178, Black's Cas. Constitutional Law, 2d 29.

⁵⁸ *State ex rel. Nuveen v. Greer*, 88 Fla. 249, 102 So. 739, 37 A.L.R. 1298.

⁵⁹ *Board of Highway Com'rs v. Bloomington*, 253 Ill. 164, 97 N.E. 280, Ann.Cas.1913A, 471.

⁶⁰ *People v. Town of Nevada*, 6 Cal. 143; *State ex rel. Attorney General v. Cincinnati*, 20 Ohio St. 18.

⁶¹ *People ex rel. v. People's Gas Light & Coke Co.*, 205 Ill. 482, 68 N.E. 950, 98 Am.St.Rep. 244; *Attorney General v. Perkins*, 73 Mich. 303, 41 N.W. 426.

ficers occupying offices created under an invalid act have been held not to become de facto officers,⁶² but the present weight of authority is to the contrary.⁶³ Persons held in prison under an invalid statute can usually procure their release by habeas corpus proceedings.⁶⁴ The rule that an unconstitutional statute affords no protection has been applied in numerous instances to impose civil liability upon public officers who have acted in reliance on such statute,⁶⁵ and criminal liability upon a private citizen whose act would have been innocent had the statute been valid.⁶⁶ There have, however, been many decisions that protect public officers against both civil and criminal liability for acts done in reliance upon statutes subsequently held unconstitutional.⁶⁷ The same principle has been applied to protect a private person who relied upon an unconstitutional exercise of his veto power by a state governor,⁶⁸ and to constitute a justification for the public reimbursement of those who had made expenditures in reliance upon an invalid statute.⁶⁹ Courts that have taken these positions have sometimes done so by invoking the theory that an invalid act is merely voidable until judicially declared unconstitutional, but a large part of the reasoning in support of these decisions invokes considerations of justice and public convenience. The view that an unconstitutional statute is voidable until judicially declared invalid is a very inadequate theoretical basis to explain results actually based on sounder reasons. In most of the decisions adopting this view the invalid statute has been treated not merely as voidable but valid.

⁶² Kirby v. State, 57 N.J.L. 320, 31 A. 213; Ex parte Snyder, 64 Mo. 58.

⁶⁶ Flaucher v. Camden, 56 N.J.L. 244, 28 A. 82.

⁶³ State v. Gardner, 54 Ohio St. 24, 42 N.E. 999, 31 L.R.A. 660; Lang v. Bayonne, 74 N.J.L. 455, 68 A. 90, 15 L.R.A., N.S., 93, 122 Am.St.Rep. 391, 12 Ann.Cas. 961; State v. Poulin, 105 Me. 224, 74 A. 119, 24 L.R.A., N.S., 408, 134 Am.St.Rep. 543.

⁶⁷ STATE v. GODWIN, 123 N.C. 697, 31 S.E. 221, Black's Cas. Constitutional Law, 2d 33; Brooks v. Mangan, 86 Mich. 576, 49 N.W. 633, 24 Am.St.Rep. 137; Henke v. McCord, 55 Iowa 378, 7 N.W. 623.

⁶⁴ Ex parte Siebold, 100 U.S. 371, 25 L.Ed. 717.

⁶⁸ Texas Co. v. State, 31 Ariz. 485, 254 P. 1060, 53 A.L.R. 258.

⁶⁵ Campbell v. Sherman, 35 Wis. 103; Warren v. Kelley, 80 Me. 512, 15 A. 49; Kelly v. Bemis, 4 Gray, Mass., 83, 64 Am.Dec. 50; Sumner v. Beeler, 50 Ind. 341, 19 Am.Rep. 718.

⁶⁹ United States v. Realty Co., 163 U.S. 427, 16 S.Ct. 1120, 41 L.Ed. 215; contra, Minnesota Sugar Co. v. Iverson, 91 Minn. 30, 97 N.W. 454.

The logical consequences of the view that an unconstitutional statute is void ab initio insofar as it covers cases to which it may not be constitutionally applied are limited by certain recognized legal doctrines that are not themselves principles of constitutional law. A taxpayer who has voluntarily paid taxes under an unconstitutional statute cannot generally recover the sums thus paid.⁷⁰ The rule frequently applied that prohibits collateral attack on the existence of public corporations or offices may result in giving legal effect to the acts of such corporations or of the officials occupying such offices even though they were created by invalid statutes.⁷¹ These decisions do not imply that courts would not in proper cases treat the unconstitutional statute as void from its inception. They do mean that courts do not invariably refuse to recognize or protect a legal result or status to whose creation or existence an invalid statute has contributed.

CHANGES IN JUDICIAL DECISIONS

37. Courts frequently protect those who have relied upon erroneous decisions on the constitutionality of a statute against the logical consequences of a subsequent over-ruling decision thereon.

The legal force of a statute during the interval between conflicting decisions as to its constitutionality is a matter on which the decisions are not uniform. The logical position is to make the latest decision determine its legal effect from the time of its enactment. If that overrules a prior decision that had sustained it, rights acquired in reliance upon the first decision will be defeated if full effect is given to the view that the statute was void ab initio. Several courts have held that rights acquired in good faith in reliance on the decision sustaining the statute constituted vested rights protected by other constitutional provisions against injury through the subsequent decision invalidating the statute.⁷² A person who had sold liquor without a li-

⁷⁰ The principle has been applied even to fines paid under a statute subsequently held invalid, *Blumenthal v. United States*, D.C., 4 F.2d 808.

⁷¹ *State v. Gardner*, 54 Ohio St. 24, 42 N.E. 999, 31 L.R.A. 660; *Lang v. Mayor of Bayonne*, 74 N.J.L. 455, 68

A. 90, 15 L.R.A.,N.S., 93, 122 Am.St. Rep. 391, 12 Ann.Cas. 961.

⁷² *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L.Ed. 520; *Thomas v. State ex rel. Gilbert*, 76 Ohio St. 341, 81 N.E. 437, 10 L.R.A.,N.S., 1112, 118 Am.St. Rep. 884.

cense in reliance upon a decision sustaining an act repealing the statute that made such sales criminal was held to have committed no crime even if it were assumed that a subsequent decision of a higher court had held the repealing act invalid.⁷³

These decisions accord those who have acted in reliance upon the erroneous decision the same rights they would have had if the statute had been valid, and to that extent treat it as possessing legal force. This is generally not true where the later decision reverses a prior one that had invalidated the statute. A person has been protected against criminal liability for doing an act during the interval between decisions invalidating and sustaining the statute that made its commission a crime.⁷⁴ Decisions of that character refuse enforcement to a valid statute. They and the earlier ones herein referred to are based on considerations of justice more than on the theory that a statute is valid, or invalid, so long as judicial decisions to that effect remain unreversed. The courts have given greater weight to the logical view that a valid statute is such *ab initio*, regardless of erroneous judicial decisions, where an issue of civil liability has been involved than where the issue has been one of criminal liability. One court has declined to enforce a contract entered into after a decision invalidating the statute that alone made it illegal but prior to the overruling decision,⁷⁵ and another has denied protection to an administrator who had distributed his intestate's assets under one statute after and in reliance upon a decision invalidating a later statute requiring a different distribution but before the latter statute had been held invalid.⁷⁶

CURATIVE ACTS

38. A statute invalid for want of legislative power to enact it does not become operative by a subsequent constitutional amendment merely conferring power to enact such statute.

A statute invalid for want of legislative power to enact it is not validated by a subsequent constitutional amendment merely conferring that power, but must be re-enacted after such amend-

⁷³ *Lutwin v. State*, 97 N.J.L. 67, 117 A. 164.

⁷⁵ *Crigler v. Shepler*, 79 Kan. 834, 101 P. 619, 23 L.R.A., N.S., 500.

⁷⁴ *State of Iowa v. O'Neil*, 147 Iowa 513, 126 N.W. 454, 33 L.R.A., N.S., 788, Ann.Cas.1912B, 691.

⁷⁶ *Pierce v. Pierce*, 46 Ind. 86.

ment has become effective.⁷⁷ A special problem of this kind involves state legislation whose application to some of the cases within its terms is invalid until Congress removes the bar to its enforcement in such cases. The commerce clause formerly limited the scope of state prohibition statutes in respect of intoxicants introduced into a state from points outside, but permitted Congress within limits to remove that protection. It has been held that a state had no power whatever to prohibit the protected transactions as long as Congress had not removed the bar, that a statute purporting to do so enacted prior to the removal of the bar was void and could not become operative merely by the removal of that bar, and that it would have to be re-enacted so far as the invalid part was concerned if that was to be made effective.⁷⁸ Another line of cases has held that the state's position with respect to the protected transactions was not one of complete lack of power, that the existence of the bar was merely to the enforcement of the prohibition in the protected cases, and that the removal of that bar by Congressional action created a situation in which the statute could validly apply in such cases without re-enactment.⁷⁹ The latter is the better view, but the states are free to choose between them so far as state statutes are concerned.⁸⁰ It has been stated that a legislature has no power to enact a statute to take effect on the adoption of a constitutional amendment curing its want of power,⁸¹ but the United States Supreme Court has intimated that "it would be going far to say that while the fate of the Amendment was uncertain Congress could not have passed a law in aid of it, conditioned upon the ratification taking place."⁸² A properly framed constitutional amendment can validate a statute originally void for want of legislative power to enact it,⁸³ and such validation can be given retroactive effect within the constitutional limits of retrospective law-making generally. The

⁷⁷ *Etchison Drilling Co. v. Flournoy*, 131 La. 442, 59 So. 867; *Whetstone v. Slonaker*, 110 Neb. 343, 193 N.W. 749.

⁷⁸ *Atkinson v. Southern Express Co.*, 94 S.C. 444, 78 S.E. 516, 48 L.R. A., N.S., 349.

⁷⁹ *State v. United States Express Co.*, 164 Iowa 112, 145 N.W. 451; *In re Rahrer*, 140 U.S. 545, 11 S.Ct. 865, 35 L.Ed. 572.

⁸⁰ *Stockyards Nat. Bank v. Bauman*, 8 Cir., 5 F.2d 905.

⁸¹ *Etchison Drilling Co. v. Flournoy*, 131 La. 442, 59 So. 867.

⁸² *Druggan v. Anderson*, 269 U.S. 36, 46 S.Ct. 14, 70 L.Ed. 151.

⁸³ *Fontenot v. Young*, 128 La. 20, 54 So. 403.

amendability of invalid statutes presents an analogous problem. Some courts regard an invalid act as a nullity whose defects are incapable of being remedied by amendment.⁸⁴ Others hold that, if the invalidity goes merely to the manner in which an existing legislative power has been exercised, the statute can be amended to cure that defect.⁸⁵ This represents the better reasoned position.

EFFECT OF PARTIAL INVALIDITY

39. The effect of the partial invalidity of a statute, or of its invalidity as applied to some cases within its terms, upon the operative effect of its other parts, or as applied to other cases within its terms, depends upon the legislative intention on that matter.
40. The presumption that the legislature intended the statute as an indivisible unit is replaced by a contrary presumption by the inclusion of a separability clause within the statute.
41. The separability clause establishes only a rebuttable presumption on that matter.

A single statute may consist of several provisions some of which are valid and others of which are invalid. The unconstitutionality of a given provision does not render any other of its provisions unconstitutional. It may, however, render them inoperative not because they are unconstitutional but because the legislature intended them to be inoperative if the given provision were unconstitutional. The legislative intention on this matter must frequently be inferred from the relation of the unconstitutional provision to the remainder of the statute. If the provisions are severable and independent of each other so that that which remains after eliminating the invalid part would leave an intelligible statute that could be given legal effect without violating a clearly apparent legislative intent to the contrary, then the constitutional part will be held enforceable.⁸⁶ If, however, it is apparent that the different parts "are so mutually connected with and dependent on each other, as conditions,

⁸⁴ *Cowley v. Town of Rushville*, 60 Ind. 327; *Keane v. Remy*, 201 Ind. 286, 168 N.E. 10; *State v. Long*, 132 La. 170, 61 So. 154.

142 Ind. 357, 41 N.E. 65, 33 L.R.A. 392; *Dwyer v. Volmar Trucking Corp.*, 105 N.J.L. 518, 146 A. 685.

⁸⁶ *Poindexter v. Greenhow*, 114 U.

⁸⁵ *Walsh v. State ex rel. Soules*, S 270, 5 S.Ct. 903, 962, 29 L.Ed. 185.

considerations, or compensation for each other, as to warrant a belief that the legislature intended them as a whole," the unconstitutionality of a part will render the dependent parts inoperative.⁸⁷ Legislatures frequently provide expressly that the unconstitutionality of a part shall not affect the enforceability of other parts. There is a presumption, in the absence of such a legislative declaration, that the legislature intended the statute to be an indivisible unit.⁸⁸ This presumption may be overcome by considerations of the kind heretofore stated, and is overcome in favor of a presumption of separability by a legislative declaration of the above character,⁸⁹ but the latter presumption is not conclusive. The separability clause is but one evidence of the legislative intent on that issue, and its effect as such may be, and frequently is, overcome by other evidence thereon found in the statute.⁹⁰ The issue is one for ultimate decision by the courts of the state whose statute is involved, and by federal courts where a federal statute is involved.⁹¹ The same considerations apply in determining the effect of the unconstitutionality of a provision as applied to some cases within its terms upon its enforceability in other cases within them in which its enforcement would produce no unconstitutional result. The effect of a specific repeal of a prior statute by a subsequent unconstitutional statute is ultimately a question of the effect upon the repeal provision of the partial unconstitutionality of the statute of which it is a part.⁹² A different, but somewhat analogous, problem is present when an exception from a general statutory rule is held to produce an unconstitutional discrimination. The invalidity of the exception would render the enforcement of the general rule in the non-excepted cases only unconstitutional, and this result is frequently accepted. The only possible methods of saving any part of such a statute are either to disregard the

⁸⁷ *Warren v. Mayor and Aldermen of Charlestown*, 2 Gray, Mass., 84; *POLLOCK v. FARMERS LOAN & TRUST CO.*, 158 U.S. 601, 15 S.Ct. 912, 39 L.Ed. 1108, Black's Cas. Constitutional Law, 2d 35.

⁸⁸ *Williams v. Standard Oil Co.*, 278 U.S. 235, 49 S.Ct. 115, 73 L.Ed. 287, 60 A.L.R. 596.

⁸⁹ *Williams v. Standard Oil Co.*, 278 U.S. 235, 49 S.Ct. 115, 73 L.Ed. 287, 60 A.L.R. 596.

⁹⁰ *Williams v. Standard Oil Co.*, 278 U.S. 235, 49 S.Ct. 115, 73 L.Ed. 287, 60 A.L.R. 596.

⁹¹ *Dorchy v. Kansas*, 264 U.S. 286, 44 S.Ct. 323, 68 L.Ed. 686.

⁹² *State ex rel. Crouse v. Mills*, 231 Mo. 493, 133 S.W. 22; *Campau v. Detroit*, 14 Mich. 276; *State ex rel. Law v. Blend*, 121 Ind. 514, 23 N. E. 511, 16 Am.St.Rep. 411.

exception and apply the general rule even in the excepted cases, or to disregard the general rule and enforce the rule contained in the exception in all cases. Most courts adopt the former,⁹³ especially when the exception is made by amendment of the statute containing the general rule.⁹⁴ The second method is occasionally followed.⁹⁵ The problem in cases of this character is that of saving the whole from unconstitutionality rather than determining whether a valid provision shall be held inoperative as a matter of legislative intent. It involves, however, a complicated problem of discovering the legislative intent as to which of two possible rules shall be deemed that established by the statute.

STARE DECISIS IN CONSTITUTIONAL LAW

42. The principle of stare decisis is sometimes applied, and sometimes ignored, in the field of constitutional law, and, because of the character of many constitutional issues, requires great caution in its application.

A court empowered ultimately to decide a constitutional issue will generally treat its decision thereon as binding upon it in subsequent cases involving exactly the same issue.⁹⁶ The rule of stare decisis is, however, frequently disregarded, and the Supreme Court of the United States has at times expressly over-ruled decisions of long standing.⁹⁷ The difficulty is to determine the precise constitutional point decided in any particular case. This is especially so when its decision is based on factors found in the factual setting in which legislation is enacted or sought to be applied. Another problem of even greater difficulty is that of the effect upon the validity of a statutory provision of a decision involving another statutory provision when that appears to have implicit in it a principle applicable

⁹³ *Ex parte Davis*, C.C., 21 F. 396; *State v. Erickson*, 159 Minn. 287, 198 N.W. 1000.

⁹⁴ *Frost v. Corp Commission*, 278 U.S. 515, 49 S.Ct. 235, 73 L.Ed. 483; *Ex parte Davis*, C.C., 21 F. 396.

⁹⁵ *State v. Barkley*, 192 N.C. 184, 134 S.E. 454.

⁹⁶ *McCully v. State*, 102 Tenn. 500, 53 S.W. 134, 46 L.R.A. 567. See discussions in *The Genesee Chief v.*

Fitzhugh, 12 How. 443, 13 L.Ed. 1053, and in dissenting opinion in *Washington v. W. C. Dawson & Co.*, 264 U.S. 219, 44 S.Ct. 302, 68 L.Ed. 646.

⁹⁷ Thus *Blackstone v. Miller*, 188 U.S. 189, 23 S.Ct. 277, 47 L.Ed. 439, was expressly overruled in *Farmer's Loan & Trust Co. v. State of Minnesota*, 280 U.S. 204, 50 S.Ct. 98, 74 L.Ed. 371, 65 A.L.R. 1000.

to the former provision. These considerations, however, merely indicate special factors that must be weighed in defining the scope of decisions on constitutional issues in applying the principle of stare decisis. They are not concerned with the problem of whether that principle is, or should be, applied at all. The cases already cited show that it is sometimes applied, and sometimes ignored. The rule of stare decisis applies only in respect to the point actually decided by a case, not in respect to the general expressions contained in the opinion therein.⁹⁸

⁹⁸ See *Humphrey's Ex'r v. United States*, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611.

CHAPTER 3

FUNCTIONAL DISTRIBUTION OF GOVERNMENTAL POWERS

- 43-45. Separation of Governmental Powers.
- 46-47. Definition and Description of the Several Functions.
- 48-52. Limitations on the Legislative Power.
- 53-55. Limitations on the Judicial Power.
- 56. Limitations on the Executive Power.
- 57-59. Delegation of Powers.

SEPARATION OF GOVERNMENTAL POWERS

- 43. The powers of government are divided into the legislative, the executive, and the judicial.
- 44. The constitutions of our system have assigned each of them to a separate governmental department, but provide for a considerable degree of interdependence among those departments.
- 45. The extent to which the principle is embodied in the government of the separate states depends solely on the constitution of each state.

The theory of the separation of powers constituted an important element in the political thought of the period when the main outlines of our constitutional theories were being formulated. The result was the incorporation of the legal principle of the separation of powers into the constitutions of our system. All of them establish governments consisting of a legislative, an executive, and a judicial department, upon each of which the people have conferred distinct and functionally differentiated portions of their sovereign powers, even though in some of them the people have reserved to themselves a direct part in the legislative process through constitutional provisions providing for the initiative and the referendum. Some of the constitutions expressly provide that the powers conferred upon one department shall not, except as specifically provided for, be exercised by either or both of the other departments. The same rule is, in the case of the others, derived by inference from the fact that the several powers are conferred upon separate departments. None of our constitutions carry the principle to the extent of making each department in all respects independent of

either or both of the others. All have established governments among whose several departments there exists a high degree of interdependence, and whose effective functioning involves co-operative action by all of them.¹ The very existence of federal courts inferior to the Supreme Court depends on action by Congress, and that of the federal judiciary on action by the President and the Senate. The effective operation of the executive and judicial departments would be impossible without legislation providing revenues to defray the costs of their operation. The essential feature of the principle of the separation of powers as embodied in our constitutions is the distribution of the several classes of governmental powers to distinct departments, not the degree of independence or interdependence existing among them. The existence of such interdependence may render possible situations in which the efficient functioning of government may be impeded by the valid actions of one or more of the departments, but it has no bearing in delimiting the field of governmental power that can be constitutionally exercised by any department. The fact that Congress has the power not to establish federal courts inferior to the Supreme Court neither expands its own powers nor limits that of such inferior courts as may at any time exist. The principal legal problems that have arisen in connection with the constitutional principle of the separation of powers have been concerned not with determining the character and degree of interdependence of the three departments but with defining the scope of the powers belonging to each of them and the resultant limitations upon the powers of the others.

No one of our constitutions has established a complete separation of powers by conferring the whole of any class of functions exclusively upon the department primarily empowered to exercise them and by limiting those exercisable by it to those belonging to that class. The executive participates in a limited manner in the legislative process through its possession of the veto power; the executive power of appointing governmental officers in many cases requires the assent of one branch of the legislature; and the Constitution of the United States specifically authorizes Congress to vest the appointment of such inferior officers as it may think proper even in the courts of law.² It is

¹ See remarks on this feature of our constitutions in EX PARTE GROSSMAN, 267 U.S. 87, 45 S.Ct. 332, 69 L.Ed. 527, 38 A.L.R. 131, Black's Cas. Constitutional Law, 2d 65.

² U.S.C.A. Const. Art. II, § 2.

also generally held that state constitutional provisions for the separation of powers apply only in distributing power among the organs of the state government, and do not apply to the governments of municipal corporations created by the state for local governmental purposes.³ It has also been held that Congress may, in exercising its exclusive power of legislating for the District of Columbia, impose on courts established thereunder duties which it could not validly impose on constitutional courts.⁴ It is probable that it would not be required to observe the principles of the separation of powers applicable to the government of the United States in establishing a government for an organized territory under its power to make all needful rules and regulations respecting the territory belonging to the United States.

The Constitution of the United States leaves to each of the states wide powers in determining the form of its own government. Neither the due process clause of the fourteenth amendment, the provision guaranteeing every state a republican form of government,⁵ nor any other of its provisions require a state to observe in the distribution of its governmental powers the principle of the separation of powers or that against the delegation of powers.⁶ The extent to which a state government embodies those principles depends wholly upon the provisions of its own constitution. A state cannot, however, by commingling the several functions in a single department abolish the distinctions between them so far as the applicability of provisions of the federal Constitution depends upon the character of particular acts of such a department. The federal Constitution leaves the state free to confer upon a single one of its governmental organs both legislative and judicial functions, but the procedural limitations of the due process clause of the fourteenth amendment would govern its performance of its judicial functions as fully as if it were a court performing judicial functions only, and in passing on its power to review them the Supreme Court of the United States would determine whether particular acts

³ State ex rel. Simpson v. Mankato, 117 Minn. 458, 136 N.W. 264, 41 L.R.A., N.S., 111; People ex rel. Attorney General v. Provines, 34 Cal. 520; Eckerson v. Des Moines, 137 Iowa 452, 115 N.W. 177; Bryan v. Voss, 143 Ky. 422, 136 S.W. 884.

⁴ Keller v. Potomac Electric Pow-

er Co., 261 U.S. 428, 43 S.Ct. 445, 67 L.Ed. 731.

⁵ Dreyer v. People of State of Illinois, 187 U.S. 71, 23 S.Ct. 28, 47 L.Ed. 79.

⁶ Forsyth v. City of Hammond, 166 U.S. 506, 17 S.Ct. 665, 41 L.Ed. 1095.

of a state department of that character were judicial or legislative.⁷

DEFINITION AND DESCRIPTION OF THE SEVERAL POWERS

46. The principal factor in the definition of each function is the character of the final act in which its exercise eventuates.
47. The function of the legislature is to make laws, of the executive department to enforce them, and of the judicial department to decide cases involving the application of existing law to past or present facts in order to define the legal relations of the parties to such cases.

The distributions of governmental powers made by the several constitutions of our system are not in all respects the same. It is obviously true of all of them that a department may validly exercise any powers, whatever their nature, that the constitution to which it owes its existence confers upon it, and that it may validly exercise no others. The most important problem that is common to all of our constitutions is that of delimiting the scope of each department's power so far as that depends upon the use of the term "legislative," "executive," or "judicial" in the constitutional provision establishing it. All government is a device for effectuating the legal regulation of a given politically organized society by regulating the private affairs of its members, by defining their relations to the State, its government and its officials, and by empowering the State itself to promote its policies by its own activities. This regulation is accomplished through the State's action in prescribing rules in accordance with which it is to proceed, and in enforcing those rules. Enforcement consists in applying a rule to the specific cases within it, and may require an ultimate resort to State force to make it effective therein. The process may be initiated by either a private person or a public official. It is a basic principle of our political and legal theories that such force shall be employed only in accordance with existing legal rules. The enforcement of a legal rule in a specific case thus necessarily involves a decision by some one as to the scope and content of the rule, on the facts of the specific case, and on the issue whether a case involving those facts is within the terms of that rule. Those who are

⁷ *Prentiss v. Atlantic Coast Line Co.*, 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150.

charged with enforcing a legal rule cannot escape making those decisions as an incident to performing those further acts involved in enforcing the rule. The necessities of orderly government demand that some one be vested with authority to make a final determination of those matters. The power to make that final determination might be vested in the same governmental department that possessed the power to ultimately execute the law. It is, however, an important element in our theory of government that those against whom a law is to be enforced are entitled, within limits that will be more fully considered elsewhere, to have the final decision on those matters made by a government department other than that empowered ultimately to execute the law by enforcing it in their specific cases. This objective is quite fully realized in so far as the State has left the enforcement of much of the law dealing with private rights to the initiative of those whose legal rights are threatened or have been invaded by providing for the judicial settlement of controversies involving such rights, and in so far as the executive department itself must invoke judicial action in enforcing the law. It is realized less completely in situations within the scope of those doctrines that restrict judicial review of executive discretion, but is not wholly dispensed with even in those fields.⁸ The essential feature of this process is that those against whom the law is to be enforced can procure the determination of a government department, acting independently of the executive agency that is to enforce the law, on the legality of that agency's action at some stage before the executory process is finally complete. The intervention of that independent department takes the form of deciding cases and controversies that are brought before it.

The process of governing a community involves at least those three kinds of governmental action. The principle of the separation of powers recognizes this and makes it the basis for a functional division of labor in the governmental structure. The functional distinctions are not to be found in every one of the detailed acts that are involved in their exercise. There are many acts that one department may do that resemble or are the same as those performable by another department but which are, nevertheless, within the former's scope of power because they are mere incidents to its performance of its constitutional function.

⁸ See F. Green, Separation and delegation of governmental powers.
2 Ill. Law Bull. 373.

Thus legislative bodies may as an aid to their performance of their legislative functions adjudge persons in contempt and punish them therefor.⁹ The similarity between some of the steps in the executive and judicial processes has already been adverted to. The principal factor in defining these functions, and in distinguishing between them, is the essential character of the final act in which their exercise eventuates. The final acts of the legislative function are binding rules in accordance with which the State's power shall be applied in the future, and by reference to which the legal relations of those within its jurisdiction shall thereafter be determined.¹⁰ The executive process eventuates in acts directed towards administering the affairs of the State and compelling conduct conforming to law. The judicial process consists in the application of existing law to the past or present facts of a specific case for the purpose of finally determining the legal rights and obligations of the parties to the controversy in accordance therewith, and in rendering an authoritative judgment therein that serves as the legal basis for such executive action as is required for its enforcement.

LIMITATIONS ON THE LEGISLATIVE POWER

48. The legislature has no power to exercise judicial functions.
49. The legislature may not unreasonably burden or interfere with the performance of its functions by the judicial department, and this limitation extends to those powers of the judicial department that are incidental to its performance of its primary function of deciding cases.
50. The legislature may not burden the judicial department by imposing on it the performance of non-judicial functions.
51. The legislature may not deprive the judicial department of the powers conferred upon it by imposing its functions on non-judicial bodies.
52. The legislature may not itself perform executive functions, transfer to non-executive officers the duties of that department, nor burden it in the performance of its functions, but this does not prohibit it from creating executive offices not

⁹ *McGrain v. Daugherty*, 273 U.S. 135, 47 S.Ct. 319, 71 L.Ed. 580, 50 A. L.R. 1; *Jurney v. MacCracken*, 294 U.S. 125, 55 S.Ct. 375, 79 L.Ed. 802; *People ex rel. McDonald v. Keeler*,

99 N.Y. 463, 2 N.E. 615, 52 Am.Rep. 49.

¹⁰ *Prentiss v. Atlantic Coast Line Co.*, 211 U.S. 210, 29 S.Ct. 67, 53 L. Ed. 150.

named in the constitution, providing for appointments thereto and removals therefrom, and defining the powers to be exercised by those occupying them.

The adoption of the constitutional device of the separation of powers necessarily restricts each department to the performance of those functions that have been conferred upon it by the applicable constitution. This means that, unless the contrary is expressly provided, the legislature cannot exercise either judicial or executive powers, the executive cannot exercise either legislative or judicial powers, and the judiciary cannot exercise either executive or legislative powers.¹¹ It is seldom that either the executive or judicial department attempts on its own initiative to exercise the power of the other or of the legislative department. It has, however, been held in a case involving the cancellation by a governor of a pardon procured by fraud that the question of the existence of such fraud as would justify such cancellation was judicial and could not be determined by the governor.¹² Nor have legislative attempts to exercise judicial power consisted in the actual trial and decision of specific cases by the legislature, but rather in the enactment of legislation that in effect required the court to follow the legislature's determination of those matters involved in the decision of specific cases upon which it is the court's function to make the ultimate decision. Legislation of this character is held to violate the principle of the separation of powers as an attempt by the legislature to exercise judicial functions. It is this that has invalidated legislative attempts to fix the amount due a creditor of the state,¹³ to determine even by indirection to which of adverse claimants to a public office the salary thereof shall be paid,¹⁴ and to determine the existence and amount of private debts and authorizing or directing the sale of the assumed debtor's lands to discharge those debts.¹⁵ The decision on whether a condition subsequent in a private grant has been broken so as to require a reconveyance by the grantor,¹⁶ whether the facts warrant the

¹¹ *SPRINGER v. GOVERNMENT OF PHILIPPINE ISLANDS*, 277 U. S. 189, 48 S.Ct. 480, 72 L.Ed. 845, *Black's Cas. Constitutional Law*, 2d 38.

¹² *Ex parte Bess*, 152 S.C. 410, 150 S.E. 54, 65 A.L.R. 1459.

¹³ *McLaughlin v. Charleston County Com'rs*, 7 S.C. 375.

¹⁴ *State ex rel. Worrell v. Carr*, 129 Ind. 44, 28 N.E. 88, 13 L.R.A. 177, 28 Am.St.Rep. 163.

¹⁵ *Lane v. Doe ex dem. Dorman*, 3 Scam. 238, 4 Ill. 238, 36 Am.Dec. 543; *Rozier v. Fagan*, 46 Ill. 404.

¹⁶ *Board of Education v. Bakewell*, 122 Ill. 339, 10 N.E. 378.

forfeiture of a private corporation's charter,¹⁷ and whether a defendant indicted for crime shall be discharged,¹⁸ belongs to the judicial, not to the legislative, department. Statutes granting new trials in specific cases,¹⁹ setting aside judgments already rendered,²⁰ granting rehearings after a case has been heard and determined on its merits,²¹ and reinstating cases in which final judgments have already been entered,²² involve invalid attempts by the legislature to exercise powers that have been historically and traditionally considered judicial. The interpretation of statutes is a judicial function which the legislature cannot exercise so as to affect cases arising under them prior to such interpretative act,²³ although such legislative interpretation may apply to subsequent cases to the same extent as any other form of statutory amendment if the legislature so intends. The prohibition against the legislative exercise of judicial power does not, however, prevent the enactment of special statutes, even if retrospective in their operation, that merely prescribe a rule for deciding a case other than that prevailing at the time when the facts involved in the case occurred. Statutes of this type clearly affect the decision of cases, some of which may be before the court at the time they are enacted, but do so only by prescribing the rule to be applied in determining the legal relations of the parties in respect of the transaction that is the subject of judicial inquiry. A statute validating prior marriages has been sustained as not violating the principle of the separation of powers,²⁴ and statutes curing defects in past transactions are generally sustained as not violating that principle²⁵ unless their effect involves the validation of void judicial proceedings²⁶

¹⁷ *In re Opinion of the Justices*, 237 Mass. 619, 131 N.E. 29; *Flint & F. Plank Road Co. v. Woodhull*, 25 Mich. 99, 12 Am.Rep. 233.

¹⁸ *State v. Fleming*, 7 Humph., Tenn., 152, 46 Am.Dec. 73.

¹⁹ *Merrill v. Sherburne*, 1 N.H. 199, 8 Am.Dec. 52; *De Chastellux v. Fairchild*, 15 Pa. 18, 53 Am.Dec. 570.

²⁰ *Taylor v. Place*, 4 R.I. 324.

²¹ *IN RE SIBLERUD*, 148 Minn. 347, 182 N.W. 168, Black's Cas. Constitutional Law, 2d 42; *Dorsey v. Dorsey*, 37 Md. 64, 11 Am.Rep. 528.

²² *Hunter v. United States*, D.C., 10 F.Supp. 1014.

²³ *In re Handley's Estate*, 15 Utah 212, 49 P. 829, 62 Am.St.Rep. 926; *Mutual Life Ins. Co. v. Jenkins*, 16 N.Y. 424.

²⁴ *Inhabitants of Town of Goshen v. Inhabitants of Town of Stonington*, 4 Conn. 209, 10 Am.Dec. 121.

²⁵ *Steger v. Traveling Men's Bldg. & Loan Ass'n*, 208 Ill. 236, 70 N.E. 236, 100 Am.St.Rep. 225. *Contra*, *Columbus, C. & I. C. R. Co. v. Board of Com'rs of Grant County*, 65 Ind. 427.

²⁶ *McDaniel v. Correll*, 19 Ill. 226,

or some other invasion of the judicial power.²⁷ Courts differ on whether the prohibited effects are present in particular cases.

The principle of the separation of powers prohibits the legislature not only from exercising judicial functions but also from unduly burdening or interfering with the judicial department in its exercise thereof. The principal function of the judicial department is the decision of cases in accordance with whatever valid laws the legislature has enacted to govern the legal relations of the parties thereto. The trial and decision of cases is conducted under a system of rules of pleadings, practice and procedure that are concerned with the methods employed by courts in performing their functions. There are good theoretical grounds for the view that the power to prescribe these rules belongs to the judicial department, and it has received judicial sanction.²⁸ The more generally prevailing view is that the power is one that is neither exclusively legislative nor exclusively judicial, but one that may be exercised by either department.²⁹ This position has been taken particularly in cases sustaining statutes conferring rule-making powers upon courts against the objection that they constituted invalid delegations of legislative powers to the courts.³⁰ The implication of the position that the power is inherently judicial³¹ is that judicially established rules would prevail over those legislatively prescribed in cases of conflict, but judicially expressed views point strongly to the conclusion that the judiciary's power in this field is subordinate to that of the legislature, and that the power is judicial only in the sense that courts may exercise it so far as the legislature

68 Am.Dec. 587; *Denny v. Mattoon*, 2 Allen, Mass., 361, 79 Am.Dec. 784.

²⁷ *Rice v. Parkman*, 16 Mass. 326.

²⁸ *State v. Roy*, 40 N.M. 397, 60 P. 2d 646, 110 A.L.R. 1; *De Camp v. Central Arizona Light & Power Co.*, 47 Ariz. 517, 57 P.2d 311.

²⁹ *In re Constitutionality of Statute Empowering Supreme Court to Promulgate Rules Regulating Pleading, Practice and Procedure in Judicial Proceedings*, 204 Wis. 501, 236 N.W. 717; *State v. Roy*, 40 N.M. 397, 60 P.2d 646, 110 A.L.R. 1.

³⁰ *In re Constitutionality of Statute Empowering Supreme Court to*

Promulgate Rules Regulating Pleading, Practice and Procedure in Judicial Proceedings, 204 Wis. 501, 236 N.W. 717; *State ex rel. Foster-Wyman Lumber Co. v. Superior Court for King County*, 148 Wash. 1, 267 P. 770.

³¹ The term "inherently" should mean only that the power in question was impliedly included in the grant made by the constitution in distributing governmental powers, although it is sometimes used to indicate that the power in question necessarily belongs to a department without reference to the constitutional grant.

has not done so.³² The legislature's power is not, however, unlimited, and such rules prescribed by it are invalid if unduly interfering with courts in their exercise of their principal function and functions incidental thereto.³³ Statutes unduly restricting the court's discretion in controlling the conduct of its business as by requiring certain cases to be tried within ten days after the filing of the answer therein,³⁴ or by limiting the time within which appeals must be heard and determined,³⁵ have been held invalid on this basis. A statute that changed the method for the appointment of a special judge was held to constitute an unreasonable interference with the courts as applied to a case in which a decision not yet final had been rendered by another judge.³⁶ The legislative power to prescribe rules of evidence is subject to the same limitations as its power to prescribe rules of pleading, practice and procedure.³⁷ Statutes that deal with rules of evidence may either prescribe what evidence may be admitted or rejected, what shall be admitted or not be admitted, or what effect shall be given to certain evidence received. There would seem to be no objection to such purely permissive statutes, nor to such mandatory statutes dealing with admissible and non-admissible evidence as do not unduly burden or restrict the court's determination of the facts in cases before it. It has been held that an Act of Congress which provided that no pardon should be admissible in evidence in support of any claim against the United States in the Court of Claims, or to establish the right of the claimant to sue in that court, and that, if already in evidence, it should not be used or considered on behalf of the claimant by said Court or by any court on appeal, was invalid as an attempt by Congress to prescribe rules of decision to the judicial department in cases pending before it and

³² *In re Constitutionality of Statute Empowering Supreme Court to Promulgate Rules Regulating Pleading, Practice and Procedure in Judicial Proceedings*, 204 Wis. 501, 236 N.W. 717; *De Camp v. Central Arizona Light & Power Co.*, 47 Ariz. 517, 57 P.2d 311.

³³ *State v. Hopper*, 71 Mo. 425; *Dupy v. Wickwire*, 1 D.Chip., Vt., 237, 6 Am.Dec. 729; *Ex parte Hagan*, 295 Mo. 435, 245 S.W. 336; *Carter v. Com.*, 96 Va. 791, 32 S.E. 780, 45 L.R.A. 310.

³⁴ *ATCHISON, T. & S. F. RY. CO. v. LONG*, 122 Okl. 86, 251 P. 486, *Black's Cas. Constitutional Law*, 2d 46.

³⁵ *Schario v. State*, 105 Ohio St. 535, 138 N.E. 63.

³⁶ *State ex rel. Youngblood v. War- rick Circuit Court*, 208 Ind. 594, 196 N.E. 254.

³⁷ *State ex rel. Columbia Tel. Co. v. Atkinson*, 271 Mo. 28, 195 S.W. 741.

violative of the principle of the separation of powers.³⁸ Statutes whose effect would be to require a court to accept certain evidence as conclusive proof of certain facts as by establishing irrebuttable presumptions have been held invalid as unreasonable invasions of the judicial sphere,³⁹ but those establishing rebuttable presumptions are not invalid on this account if there is a reasonable connection between the fact that is to be *prima facie* evidence of another and that other fact.⁴⁰ The effect of such decisions is the reservation by the court⁴¹ for itself of the decision on the legal sufficiency of the evidence to prove facts in issue in cases before it. The same principle has been extended to other questions involving the legal sufficiency of evidence such as its sufficiency to warrant the case in going to the jury, and is the basis for those decisions holding invalid statutes prohibiting directed verdicts,⁴² requiring a court to grant a change of venue on the mere filing of an affidavit charging the facts requisite therefor,⁴³ or in effect depriving the court of its power to determine the existence of contributory negligence as a matter of law by giving the jury the complete power to decide the issue of liability in a certain class of negligence cases.⁴⁴ The same reasoning would require similar holdings with respect to any other statutes whose effect would be to require a court to reach a decision which it did not deem in accordance with the law and the facts of the case before it as by unduly restricting it in setting aside the decisions of administrative boards in its review thereof.⁴⁵ Nor has the legislature any power to direct

³⁸ *United States v. Klein*, 13 Wall. 128, 20 L.Ed. 519. The Court of Claims is now held not to be a "constitutional court." See chapter 13, Section 216.

³⁹ *State ex rel. Columbia Tel. Co. v. Atkinson*, 271 Mo. 28, 195 S.W. 741; *Gordon v. Lowry*, 116 Neb. 359, 217 N.W. 610; *Southern Cotton Oil Co. v. Raines*, 171 Ga. 154, 155 S.E. 494.

⁴⁰ *Brinkley v. State*, 125 Tenn. 371, 143 S.W. 1120; *Johnson County Savings Bank v. Walker*, 79 Conn. 348, 65 A. 132; *State v. Dowdy*, 145 N.C. 432, 58 S.E. 1002.

⁴¹ "Court" here does not include the jury.

⁴² *Thoe v. Chicago, M. & St. P. Ry. Co.*, 181 Wis. 456, 195 N.W. 407, 29 A.L.R. 1280; *People v. McMurchy*, 249 Mich. 147, 228 N.W. 723. Contra, *Zimmerman v. Chicago & N. W. Ry. Co.*, 129 Minn. 4, 151 N.W. 412.

⁴³ *Farmer v. Christian*, 154 Va. 48, 152 S.E. 382; Contra, *State ex rel. Beach v. Judicial District Court*, 53 Nev. 444, 5 P.2d 535.

⁴⁴ *Bielecki v. Union Trucking Service*, 247 Mich. 661, 226 N.W. 675.

⁴⁵ *Commerce Commission v. Cleveland, C. & St. L. Ry. Co.*, 309 Ill. 165, 140 N.E. 868.

the court as to the decision it shall reach on the issues of fact and law on which depend the decision in cases before it. A state statute providing that no state statute should be adjudged by the state's supreme court violative of any provision of the state's constitution unless concurred in by more than a majority of the members of the court would amount to a legislative usurpation of the judicial function to determine what is the law applicable to such case, and would constitute an invalid interference with the court's internal functioning.⁴⁶ A similar enactment by Congress to control the Supreme Court of the United States in the performance of its functions would violate the federal Constitution despite the provision under which Congress can control its appellate jurisdiction, since such an Act is not concerned with defining that but with regulating the Court's internal functioning while acting in cases within its appellate jurisdiction.⁴⁷ The court is entitled to control its internal affairs, and the legislature cannot compel it even to write opinions⁴⁸ and headnotes,⁴⁹ in the cases decided by it.

A constitution may itself establish courts, merely provide for their creation, or employ both devices in its provisions for the judicial department. The Constitution of the United States establishes the Supreme Court but confers upon Congress the power to establish courts inferior to the Supreme Court. The constitutions of many states establish both their supreme courts and the principal inferior courts in their judicial systems, and empower the legislature to establish other inferior courts. The legislature may not abolish courts established by the constitution, but may those whose existence depends on its action. The jurisdiction of courts may also be defined by the constitution as is true of the original jurisdiction of the federal Supreme Court, or be left by it to be defined by the legislature as is the case with federal courts inferior to the Supreme Court. The ultimate source of the judicial power possessed by any court established to exercise the functions conferred upon the judicial department established by the constitution is that grant of power. This is true whether that court be established by the constitution or by the legislature, and whether its jurisdiction be

⁴⁶ See *Perkins v. Scales*, an unreported case referred to in *Northern v. Barnes*, 2 Lea, Tenn., 603.

⁴⁷ U.S.C.A. Const., Art. III, § 2.

⁴⁸ *Houston v. Williams*, 18 Cal. 24,

73 Am. Dec. 565; *Vaughn v. Harp*, 49 Ark. 160, 4 S.W. 751.

⁴⁹ Ex parte Griffiths, 118 Ind. 83, 20 N.E. 513, 3 L.R.A. 398, 10 Am. St. Rep. 107.

defined by the constitution or by the legislature. The judicial power thus conferred is generally held to include not merely that of deciding cases but also incidental powers necessary to the effective performance of that primary function. It cannot be said to have been determined whether the power to issue any or all of the extraordinary writs constitutes an integral part of the judicial power that courts have within the area of their jurisdiction or whether the power to issue them is an element in defining their jurisdiction.⁵⁰ The issue is important in determining the validity of legislation depriving courts of their power to issue such writs, or to so regulate their use of them as to unduly impair the usefulness of such writs. If the matter is one that goes to the jurisdiction of a court, the legislature may deprive any court of such power, or regulate its exercise thereof, to any extent that it has the power to define that court's jurisdiction. It has been held that Congress may, under its power to define the jurisdiction of inferior federal courts, limit their power to issue injunctions in labor disputes.⁵¹ If, however, the matter is one that goes to the extent of the judicial power conferred upon a court, then the issue becomes how far may the legislature regulate its performance, and the legislature's power to subject it to reasonable regulations is clearly established by the line of cases involving legislative regulation of one of these powers, that of a court to adjudge persons in contempt of its authority and to punish them therefor. The legislature cannot completely deprive a court of this power,⁵² and statutes limiting its exercise thereof to the cases specified therein have been held invalid.⁵³ The legislature may prescribe the measure or limits of punishment for contempts committed out of the presence of the courts if the penalty is sufficient to enable the court to vindicate its authority and maintain the dignity and respect due it.⁵⁴

⁵⁰ *MARBURY v. MADISON*, 1 Cranch 137, 2 L.Ed. 60, Black's Cas. Constitutional Law, 2d 9.

⁵¹ *Cinderella Theatre Co., Inc. v. Sign Writers' Local Union No. 591*, D.C., 6 F.Supp. 164.

⁵² *Eicher v. Tinley*, 221 Iowa 293, 264 N.W. 591.

⁵³ *State ex inf. Crow v. Shepherd*, 177 Mo. 205, 76 S.W. 79, 99 Am.St. Rep. 624; *Little v. State*, 90 Ind.

338, 46 Am.Rep. 224; *State v. Morrill*, 16 Ark. 384. The case first cited was overruled in *Ex parte Creasy*, 243 Mo. 679, 148 S.W. 914, 41 L.R.A., N.S., 478.

⁵⁴ *Eicher v. Tinley*, 221 Iowa 293, 264 N.W. 591; *Ex parte Creasy*, 243 Mo. 679, 148 S.W. 914, 41 L.R.A., N.S., 478; *In re Garner*, 179 Cal. 409, 177 P. 162; *Richardson v. Com.*, 141 Ky. 497, 133 S.W. 213. Contra, *In re Opinion of the Justices*, 86 N.H. 597, 166 A. 640.

The principal controversy has waged about the legislature's power to require jury trial in contempt proceedings. The weight of authority denies it that power in the cases of direct and civil contempts.⁵⁵ An Act of Congress providing for jury trials where the act constituting the contempt was also a crime has been sustained by the federal Supreme Court.⁵⁶ The Court stressed the fact that the proceeding was a punitive one to vindicate the court's authority and to punish the act of disobedience as a public wrong, and intimated clearly that the decision would have been different had the provision included civil contempts or acts committed in the presence of the court or so near thereto as to obstruct the administration of justice. The limits on the legislative power to regulate this judicial power are determined by the degree of interference with the administration of justice that the regulation involves. The same principle defines its limits in regulating the exercise by courts of the other elements in their judicial power referred to above. The legislature may, however, punish contempts of court as misdemeanors since this does not interfere with the court's power to punish them but is rather in aid of the courts.⁵⁷

The power to appoint its own officers belongs to the judicial department except as the constitution provides otherwise. The principal controversy in this field has involved the extent of the legislature's power to regulate admissions to the bar and disbarments. The legislature is generally held to have no power to compel courts to admit to the bar those who do not meet the requirements imposed by the courts themselves.⁵⁸ Most of the cases of this character have involved legislative attempts to force the admission of persons not meeting the judicial standard of legal training. The legislature may, however, exercise its police power to protect the public interest by prescribing reasonable qualifications for admission to the bar and courts may not admit those not meeting those qualifications.⁵⁹ It has been

⁵⁵ *Carter v. Com.*, 96 Va. 791, 32 S. E. 780, 45 L.R.A. 310; *Walton Lunch Co. v. Kearney*, 236 Mass. 310, 123 N.E. 429; *Fort v. Co-op. Farmers' Exchange, Inc.*, 81 Colo. 431, 256 P. 319.

⁵⁶ *MICHAELSON v. UNITED STATES ex rel. Chicago, St. P., M. & O. R. Co.*, 266 U.S. 42, 45 S.Ct. 18, 69 L.Ed. 162, 35 A.L.R. 451, *Black's Cas. Constitutional Law*, 2d 50.

⁵⁷ *Ex parte Morris*, 194 Cal. 63, 227 P. 914.

⁵⁸ *In re Day*, 181 Ill. 73, 54 N.E. 646, 50 L.R.A. 519; *In re Cannon*, 206 Wis. 374, 240 N.W. 441; *In re Lavine*, 2 Cal.2d 324, 41 P.2d 161. *Contra*, *In re Cooper*, 22 N.Y. 67; *In re Applicants for License*, 143 N.C. 1, 55 S.E. 635, 10 L.R.A., N.S., 288, 10 Ann.Cas. 187.

⁵⁹ *In re Cannon*, 206 Wis. 374, 240

stated that these are to be regarded as limitations not on the judicial department but on individuals seeking admission to the bar.⁶⁰ The legislature may define who shall not practise law, but not who shall be admitted to do so.⁶¹ The practice of law includes not only appearance before the courts but the customary functions of lawyers which do not involve such appearance.⁶² The power to disbar is also judicial but may be subjected to reasonable legislative regulation.⁶³ A statute requiring jury trials in disbarment cases has been sustained as not an invalid interference with the court's power, but the court intimated that the legislature could not limit disbarments to cases in which the jury had returned a verdict of disbarment.⁶⁴ A statute prohibiting proceedings for the disbarment of attorneys to be instituted more than two years after the commission of the offense or misconduct complained of, or more than one year after its discovery, has been held an invalid legislative invasion of the judicial field.⁶⁵ The judicial character of the disbarment of attorneys has also been held to invalidate a statute conferring the power to suspend or disbar an attorney upon the state bar association.⁶⁶ The power to appoint other court officers has also been held judicial and legislative attempts to deprive courts of their discretion in that matter have been held to violate the principle of the separation of powers.⁶⁷

The proper and efficient exercise of its functions by the judicial department could be greatly impeded if another department were empowered to impose on it the performance of non-judicial duties. It is, therefore, the practically universal rule that the legislature may not impose non-judicial duties, nor confer

N.W. 441; *In re Chapelle*, 71 Cal. App. 129, 234 P. 906.

⁶⁰ *In re Opinion of the Justices*, 279 Mass. 607, 180 N.E. 725, 81 A.L.R. 1059.

⁶¹ *In re Opinion of the Justices*, 289 Mass. 607, 194 N.E. 313.

⁶² *In re Opinion of the Justices*, 289 Mass. 607, 194 N.E. 313.

⁶³ *In re Smith*, 73 Kan. 743, 85 P. 584; *State v. Mosher*, 128 Iowa 82, 103 N.W. 105, 5 Ann.Cas. 984; *In re Ebbs*, 150 N.C. 44, 63 S.E. 190, 19 L.R.A., N.S., 892, 17 Ann.Cas. 592.

⁶⁴ *State Board of Law Examiners v. Phelan*, 43 Wyo. 481, 5 P.2d 263, 78 A.L.R. 1317.

⁶⁵ *In re Tracy*, 197 Minn. 35, 266 N.W. 88, 267 N.W. 142.

⁶⁶ *In re Edwards*, 45 Idaho 676, 266 P. 665.

⁶⁷ *State ex rel. Sorensen v. State Bank of Minatare*, 123 Neb. 109, 242 N.W. 278; *In re Janitor of Supreme Court*, 35 Wis. 410; *State ex rel. Hovey v. Noble*, 118 Ind. 350, 21 N.E. 244, 4 L.R.A. 101, 10 Am.St.Rep. 143.

non-judicial powers, upon the courts unless the constitution expressly provides otherwise. Statutes requiring them to give advisory opinions on the request of the legislative or executive departments have been held invalid for this reason.⁶⁸ The Supreme Court of the United States declined to give an opinion on questions arising under the Jay Treaty on the ground that its function was limited to the decision of cases and controversies. The view that the rendering of advisory opinions is no part of the judicial power is wholly sound. The constitutions of some of the states expressly impose that duty on their supreme courts.⁶⁹ It was in part because the court deemed that the statute imposed upon it the duty of acting as legal advisor to the people of the state that the Supreme Court of Michigan held invalid a declaratory judgment act.⁷⁰ The distinctive feature of a declaratory judgment is that no executory process follows as of course the declaration of the rights as between the parties to the action. Declaratory judgment acts permit actions to be brought even before actual damages have occurred and before a wrong is immediately threatened, and the only prayer for relief required is for a declaration of rights. An action can, however, be brought only in case of an actual and bona fide controversy, thus excluding moot cases. The judgment is either expressly, or by judicial construction of the statute, treated as *res judicata* of the issues involved. The principal differences between the procedure authorized by such statutes and proceedings for injunction are that the imminence of threatened injury need not be alleged or shown and that no executory process need immediately follow the court's action in declaring rights. The state courts that have passed on the validity of such statutes embodying the above provisions at present unanimously agree that they do not impose on the courts the non-judicial duties of deciding moot cases and rendering advisory opinions but merely create a new procedural device for the settlement of actual cases and controversies.⁷¹ Cases origi-

⁶⁸ *In re Senate of State*, 10 Minn. 78, 10 Gil. 56; *In re Constitutionality of House Bill No. 222*, 262 Ky. 437, 90 S.W.2d 692, 103 A.L.R. 1085.

⁶⁹ See those of Colorado, Maine, Massachusetts, New Hampshire, Rhode Island, Florida, and South Dakota.

⁷⁰ *Anway v. Grand Rapids Ry. Co.*,

211 Mich. 592, 179 N.W. 350, 12 A.L.R. 26.

⁷¹ *Braman v. Babcock*, 98 Conn. 549, 120 A. 150; *Blakeslee v. Wilson*, 190 Cal. 479, 213 P. 495; *State ex rel. v. Grove*, 109 Kan. 619, 201 P. 82, 19 A.L.R. 1116; *Petition of Kariher*, 284 Pa. 455, 131 A. 265; *Washington-Detroit Theatre Co. v.*

nating in state courts under the declaratory judgment procedure in which federal rights are brought to a final adjudication in state courts will be reviewed by the Supreme Court of the United States so long as they present actual, not hypothetical, controversies within the meaning of the Judiciary Article of the federal Constitution.⁷² It has also been held that the requisites of judicial action are present where the judgment of the court finally establishes the duty of the executive to enforce it though the court itself cannot initiate the executory processes.⁷³ These considerations justify the recent decision sustaining the Federal Declaratory Judgment Act.⁷⁴ The legislature could not, however, impose on courts the duty to pass on even the conflicting claims of parties if their decisions thereon had, or could have, no legal consequences whatever on the position of the parties to the proceedings. This is the real basis for decisions holding that no case or controversy exists within the federal judicial power where the court's action is subject to revision by another department,⁷⁵ or can have no effect because a jury's verdict of acquittal cannot be changed.⁷⁶

There are certain matters that the legislature itself may determine or whose decision it may entrust to administrative officers or boards. The question has frequently arisen as to how far it may confer the determination of such matters on the courts, or impose on them the duty to do so. Statutes are common that authorize proceedings before a court to determine

Moore, 249 Mich. 673, 229 N.W. 618, 68 A.L.R. 105.

⁷² Nashville, C. & St. L. Ry. Co. v. Wallace, 288 U.S. 249, 53 S.Ct. 345, 77 L.Ed. 730, 87 A.L.R. 1191. See also Alabama v. Arizona, 291 U.S. 286, 54 S.Ct. 399, 78 L.Ed. 798, and United States v. West Virginia, 295 U.S. 463, 55 S.Ct. 789, 79 L.Ed. 1546, for statements concerning advisory opinions and declaratory judgments in relation to judicial power of the United States.

⁷³ Old Colony Trust Co. v. Commissioner of Internal Revenue, 279 U.S. 716, 49 S.Ct. 499, 73 L.Ed. 918; Commissioner of Internal Revenue v. Liberty Bank & Trust Co., 6 Cir., 59 F.2d 320; sustaining statutory pro-

visions granting judicial review of decisions of the Board of Tax Appeals at the instance of either the taxpayer or the Commissioner of Internal Revenue.

⁷⁴ Zenie Bros. v. Miskend, D.C., 10 F.Supp. 779; AETNA LIFE INS. CO. OF HARTFORD v. HAWORTH, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617, 108 A.L.R. 1000, Black's Cas. Constitutional Law, 2d 54.

⁷⁵ Gordon v. United States, 117 U.S. 697.

⁷⁶ United States v. Evans, 213 U.S. 297, 29 S.Ct. 507, 53 L.Ed. 803. But see State v. Lee, 65 Conn. 265, 30 A. 1110, 27 L.R.A. 498, 48 Am.St.Rep. 202.

whether the circumstances exist on whose existence the legislature has conditioned the incorporation of cities, the creation of road districts, and other similar acts, and that empower or require the court to enter the appropriate order according as it finds that the requisite conditions do or do not exist in the specific case before it. The proceedings are usually adversary in fact as well as in form. If the statute merely confers on the court the power or imposes on it the duty to determine the existence of facts and requires it to enter such order as will effectuate the policy that the legislature has determined shall be carried out according as such facts do or do not exist, it is valid and imposes no non-judicial functions on the court.⁷⁷ If, however, the statute vests in the court the power or imposes on it the duty of deciding matters of legislative policy in reaching its decision of the case, it is invalid as imposing non-judicial duties on the court. The decisions are not in accord as to when a statute has this effect. The question generally arises when the court's action is conditioned by factors that involve its exercise of discretion on such matters as what would be for the public interest or the welfare of those that would be affected by its action. Statutes conferring upon courts the power to order the incorporation of villages if they should find that the interests of the inhabitants would be promoted thereby have been held valid by some courts,⁷⁸ and held invalid by others as imposing non-judicial duties on the courts and delegating legislative powers to them.⁷⁹ The same conflict is found where the statutes confer similar discretion in creating districts for other public or semi-public purposes,⁸⁰ or confer on them the duty to fix the boundaries of cities or such districts.⁸¹ The levying of taxes is

⁷⁷ *State v. Ueland*, 30 Minn. 29, 14 N.W. 58.

⁷⁸ *Forsythe v. Hammond*, C.C., 68 F. 774; *Burlington v. Leebrick*, 43 Iowa 252.

⁷⁹ *State v. Simons*, 32 Minn. 540, 21 N.W. 750; *People ex rel. Shumway v. Bennett*, 29 Mich. 451, 18 Am. Rep. 107; *In re Incorporation of North Milwaukee*, 93 Wis. 616, 67 N.W. 1033, 33 L.R.A. 638.

⁸⁰ *Searle v. Yensen*, 118 Neb. 835, 226 N.W. 464, 69 A.L.R. 257 (invalid); *State ex rel. Bryant v. Akron*

Metropolitan Park Dist. for Summit County, 120 Ohio St. 464, 166 N.E. 407 (valid).

⁸¹ *Funkhouser v. Randolph*, 287 Ill. 94, 122 N.E. 144 (invalid); *Tyson v. Washington County*, 78 Neb. 211, 110 N.W. 634, 12 L.R.A., N.S., 350 (invalid); *State ex rel. Bryant v. Akron Metropolitan Park Dist. for Summit County*, 120 Ohio St. 464, 166 N.E. 407 (valid). For other cases sustaining or invalidating the imposition of other kinds of administrative duties on courts, see *Norwalk St. Ry. Co.'s Appeal*, 69 Conn. 576,

clearly a legislative function,⁸² but their assessment so far as that depends on the value of the taxed property has been held both legislative,⁸³ non-judicial,⁸⁴ and essentially judicial in character.⁸⁵ These different theories as to its nature account for the discordant decisions on the extent to which courts can be made to review assessments made by administrative officers and boards. Courts that hold the process to be either legislative or at least non-judicial in character hold that the legislature may not impose on them the duty to review the propriety or accuracy of the valuations of administrative officers or boards, while those that consider the process judicial in nature sustain statutes of that character as not imposing on them non-judicial functions.⁸⁶ It is immaterial in the application of these principles whether the legislature casts non-judicial duties on courts in the first instance or by defining the scope of judicial review of administrative action so as to require the reviewing court to determine matters of legislative policy or to require them to perform acts of a legislative character. A statute requiring a court to test the propriety of an order granting or denying a license by determining whether the advantages of granting or denying it outweigh the disadvantages thereof has been held invalid on this score.⁸⁷ Nor may a court be empowered or required in reviewing orders of a public service board to enter orders involving its revision of the legislative discretion conferred upon such board,⁸⁸ although Congress may impose that duty on legislative courts.⁸⁹ The imposition of administrative duties upon courts is often sustained where their performance involves no exercise of legislative discretion, especially where

37 A. 1080, 38 A. 708, 39 L.R.A. 794 (invalid); *Zanesville v. Zanesville Tel. & Teleg. Co.*, 60 Ohio St. 442, 59 N.E. 109 (invalid); *Hooper Tel. Co. v. Nebraska Tel. Co.*, 96 Neb. 245, 147 N.W. 674 (valid); *Citizens' Savings Bank v. Greenburgh*, 173 N.Y. 215, 65 N.E. 978 (valid).

⁸² *Munday v. Assessors of City of Rahway*, 43 N.J.L. 338; *Hardenburgh v. Kidd*, 10 Cal. 402.

⁸³ *Auditor v. Atchison, T. & S. F. Ry. Co.*, 6 Kan. 500, 7 Am.Rep. 575.

⁸⁴ *Mayor, etc., of City of Baltimore v. Bonaparte*, 93 Md. 156, 48 A. 735.

⁸⁵ *Pennington v. Woolfolk*, 79 Ky. 13; *Wheeling Bridge & Tr. Ry. Co.*, 39 W.Va. 142, 19 S.E. 551; *Edes v. Boardman*, 58 N.H. 580.

⁸⁶ See cases in footnotes 83, 84, and 85.

⁸⁷ *Hodges v. Public Service Comm.*, 110 W.Va. 649, 159 S.E. 834.

⁸⁸ *Sterling Refining Co. v. Walker*, 165 Okl. 45, 25 P.2d 312.

⁸⁹ *Keller v. Potomac Electric Power Co.*, 261 U.S. 428, 43 S.Ct. 445, 67 L.Ed. 731.

required in the course of the administration of justice.⁹⁰ The legislature is also prohibited from burdening courts with the performance of executive duties. A statute imposing on a judge the duties of prosecutor as the governor's representative in investigating official misconduct is invalid for that reason.⁹¹ The power of the legislature to impose on courts the duty of appointing non-judicial officers is generally sustained on the theory that making such appointments is not the exclusive function of any single department and that it frequently involves the exercise of judgment so that it is in a sense judicial.⁹² The latter position involves an extremely broad conception of what constitutes the exercise of judicial power. The courts that hold such statutes invalid as imposing non-judicial duties on courts treat the appointing power as primarily executive in character.⁹³ The Constitution of the United States specifically authorizes Congress to vest the appointment of inferior officers in the courts.⁹⁴ A statute requiring courts to appoint their own subordinate officers is valid since their appointment may well be considered a power incidental to the judicial function itself.⁹⁵ It should be noted that the problem considered in those cases involving the grant of legislative discretion to the courts is not invariably the extent to which the legislature may delegate its power to others (although that also is frequently involved in them), but that of its power to impose any part of it on the courts. This is clear from the cases holding that the fixing of utility rates cannot be cast upon the courts although the legislature may delegate that to an administrative board. The purpose of the principles considered above is not to require the legislature itself to do the acts involved in the decisions, but to protect the courts from being forced to do them.

A somewhat analogous problem involves the extent to which the legislature can impose functions upon appellate courts. If

⁹⁰ State ex rel. Sundberg v. District Court of Hennepin County, 185 Minn. 396, 241 N.W. 39.

⁹¹ In re Richardson, 247 N.Y. 401, 160 N.E. 655.

⁹² People v. Hoffman, 116 Ill. 587, 5 N.E. 596, 8 N.E. 788, 56 Am.Rep. 793; Minsinger v. Rau, 236 Pa. 327, 84 A. 902, Ann.Cas.1913E, 1324; Fox v. McDonald, 101 Ala. 51, 13 So. 416, 21 L.R.A. 529, 46 Am.St.Rep. 98.

⁹³ State ex rel. Young v. Brill, 100 Minn. 499, 111 N.W. 294, 639, 10 Ann.Cas. 425; Supervisors of Election Case, 114 Mass. 247, 19 Am. Rep. 341; In re Appointment of Revisor of Statutes, 141 Wis. 592, 124 N.W. 670, 18 Ann.Cas. 1176.

⁹⁴ U.S.C.A.Const. Art. II, § 2.

⁹⁵ State ex rel. Douglas v. Westfall, 85 Minn. 437, 89 N.W. 175, 57 L.R.A. 297, 89 Am.St.Rep. 571.

the constitution confers a limited degree of original jurisdiction upon the supreme court established by it, the legislature has no power to add to its original jurisdiction.⁹⁶ Nor may it impose upon a court having only appellate jurisdiction duties pertaining to a trial court or those that are not a part of its appellate jurisdiction. A statute authorizing trial courts to certify questions of law to appellate courts, the trial being held in abeyance pending the answer to the questions, has been held invalid on the theory that appellate jurisdiction extends only to the review of a case after the trial court has entered a final judgment therein.⁹⁷ The court intimated that, but for historical reasons, the act would also have been invalid had it authorized such procedure even after the trial court had entered a final judgment in the case. The federal Supreme Court has, however, stated that it is proper for it to answer questions certified even before a final judgment has been entered in a case.⁹⁸ What constitutes the exercise of appellate functions is a matter that may well turn on the scope of the power as it existed at the time the particular constitution was adopted.⁹⁹

The grant of the judicial power to the judicial department involves as one of its consequences that no other department shall deprive it of its powers directly or by transferring any of them to those who are not members of the judicial department. This matter has already been considered insofar as the legislature itself attempted to perform judicial acts. The judicial power of a court resides in it and the legislature cannot confer it upon a single judge thereof,¹ nor appoint persons to act as a commission of appeal to assist the court in the performance of its duties.² It is a part of the trial court's judicial power to judge the law applicable to the facts of a case before it, and a statute that makes the jury the judge of both law and fact in a criminal trial has been held invalid as conferring judicial pow-

⁹⁶ *MARBURY v. MADISON*, 1 Cranch 137, 2 L.Ed. 60, Black's Cas. Constitutional Law, 2d 9; *Klein v. Valerius*, 87 Wis. 54, 57 N.W. 1112, 22 L.R.A. 609.

⁹⁷ *Morrow v. Corbin*, 122 Tex. 553, 62 S.W.2d 641.

⁹⁸ *Old Colony Trust Co. v. Commissioner of Internal Revenue*, 279 U.S. 716, 49 S.Ct. 499, 73 L.Ed. 918.

⁹⁹ *Ft. Smith Light & Traction Co. v. Bourland*, 160 Ark. 1, 254 S.W. 481.

¹ *State ex rel. Ballew v. Woodson*, 161 Mo. 444, 61 S.W. 252.

² *State ex rel. Hovey v. Noble*, 118 Ind. 350, 21 N.E. 244, 4 L.R.A. 101, 10 Am.St.Rep. 143; *In re Courts of Appeal*, 9 Colo. 623, 21 P. 471.

er upon persons not members of the judicial department.³ This principle is also the basis for prohibiting the commingling of legislative and judicial functions in a single body, as was held to have been done by a statute that conferred upon a single body the power to both fix rates and pass on their validity.⁴ The power to adjudge persons in contempt and punish them therefor as an incident to the enforcement and application of law to specific cases is generally held to be a judicial power that legislation may not confer upon executive or administrative officers and boards,⁵ although it has been held valid to confer it upon a workman's compensation board when engaged in hearing specific cases on the theory that the board was performing duties of a judicial character therein.⁶ This, however, is a minority position. The legislature can obviate the inconveniences imposed on executive and administrative boards by the prevailing doctrine by statutes authorizing judicial proceedings to compel the giving of testimony, which have been sustained as not imposing non-judicial functions on courts.⁷ Most of the cases dealing with the claim that judicial powers had been conferred on non-judicial officers have involved statutes conferring on executive or administrative officers or boards powers of decision in specific cases in enforcing the legislative policy with whose execution they are charged. Such statutes do not confer judicial power merely because such officials and boards are charged with the duty of determining in specific cases whether their facts warrant the conclusion that the legislatively prescribed conditions exist therein that require the enforcement of the legislative rule even though this necessarily involves decisions on the meaning of the law.⁸ The transfer of judicial power must be found, if at all, in the limitations imposed upon the judicial review of their acts.⁹ If those limitations result in giv-

³ *People v. Bruner*, 343 Ill. 146, 175 N.E. 400.

⁴ *Western Union Tel. Co. v. Myatt*, C.C., 98 F. 335.

⁵ *People v. Swena*, 88 Colo. 337, 296 P. 271; *Langenberg v. Decker*, 131 Ind. 471, 31 N.E. 190, 16 L.R.A. 108; *In re Sims*, 54 Kan. 1, 37 P. 135, 25 L.R.A. 110, 45 Am.St.Rep. 261.

⁶ *In re Hayes*, 200 N.C. 133, 156 S.E. 791, 73 A.L.R. 1179.

⁷ *Interstate Commerce Comm. v.*

Brimson, 154 U.S. 447, 14 S.Ct. 1125, 38 L.Ed. 1047.

⁸ *Klafter v. State Board of Examiners of Architects*, 259 Ill. 15, 102 N.E. 193, 46 L.R.A., N.S., 532, Ann.Cas. 1914B, 1221; *Noble v. English*, 183 Iowa 893, 167 N.W. 629; *State ex rel. Dybdal v. State Securities Commission*, 145 Minn. 221, 176 N.W. 759; *State v. Darazzo*, 97 Conn. 728, 118 A. 81.

⁹ *People ex rel. Kern v. Chase*, 165 Ill. 527, 46 N.E. 454, 36 L.R.A. 105.

ing them finality of decision on matters of law or of constitutional fact, the statute will be held to have effected an invalid transfer of judicial power to them.¹⁰ The scope of required judicial review of the decisions of such officers or boards is usually tested by the procedural requirements of due process, which explains the paucity of decisions on the matter so far as the principle of the separation of powers is involved.

The legislature is also prohibited from performing executive acts, from conferring executive powers on certain of its own members composing a joint committee of both houses,¹¹ and from engrafting executive duties upon a legislative office.¹² It may not provide that shares of stock owned by a government, whether in its governmental or proprietary capacity, shall be voted by a board of which legislative officers are members.¹³ The same case held that this also constituted a legislative intrusion upon the executive appointing power. Constitutions frequently confer upon the chief executive the appointing power in respect of specified offices while leaving appointments to other offices to be provided by law. This permits the legislature to vest the appointment of such other officers in departments other than the executive and to regulate the executive's exercise thereof if the legislature confers it on him.¹⁴ Even where the constitution contains no such provision the legislature may provide for appointments by departments other than the executive so far as courts have held the function to be not exclusively executive. These cases have already been considered. The extent to which the appointing power conferred upon the executive may be regulated by the legislature is not entirely clear. All agree that the legislature could not prescribe qualifications that so limit the executive's discretion and trench upon its choice as to amount to a legislative designation of the appointee,¹⁵ but as

¹⁰ *Crowell v. Benson*, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598.

¹¹ *Stockman v. Leddy*, 55 Colo. 24, 129 P. 220, Ann.Cas.1916B, 1052; *Gibson v. Kay*, 68 Or. 589, 137 P. 864.

¹² *SPRINGER v. GOVERNMENT OF PHILIPPINE ISLANDS*, 277 U.S. 189, 48 S.Ct. 480, 72 L.Ed. 845, Black's Cas. Constitutional Law, 2d 38.

¹³ *SPRINGER v. GOVERNMENT OF PHILIPPINE ISLANDS*, 277 U.S. 189, 48 S.Ct. 480, 72 L.Ed. 845, Black's Cas. Constitutional Law, 2d 38.

¹⁴ *People ex rel. v. Capp*, 61 Colo. 396, 158 P. 143; *Ingard v. Barker*, 27 Idaho 124, 147 P. 293.

¹⁵ *Westlake v. Merritt*, 85 Fla. 28, 95 So. 662; see also statement in *Myers v. United States*, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160.

to how far it can regulate it where that effect is absent is a matter of dispute.¹⁶ The legislature may regulate the removal of executive officers so far as their appointment is within its constitutional control although this is limited by some decisions so far as it involves offices the appointment to which it has conferred upon the chief executive.¹⁷ Its power to regulate the removal of officers whose appointment is vested in the chief executive by the constitutions is generally denied.¹⁸ The limitations on its power to regulate appointment and removal of officers do not extend to those whose functions are legislative and quasi-judicial rather than executive.¹⁹ The power to pardon offenses is generally conferred on the executive by our constitutions. The legislature may not itself exercise it nor confer it upon another department.²⁰ Acts of general amnesty,²¹ statutes conferring the power to remit penalties upon inferior executive officers,²² those providing for indeterminate sentences or suspended sentences in criminal cases,²³ and those permitting designated officials to parole those convicted,²⁴ have been sustained as involving no interference with the chief executive's pardon power. They leave that power unaffected since most of them merely authorize a change in the sentence whereas a pardon leaves the sentence unaffected but protects the defendant from its operation.

¹⁶ See discussion in *People ex rel. v. Capp*, 61 Colo. 396, 158 P. 143; *State ex rel. Harvey v. Wright*, 251 Mo. 325, 158 S.W. 823, Ann.Cas. 1915A, 588.

¹⁷ See *Myers v. United States*, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160.

¹⁸ *Myers v. United States*, *supra*.

¹⁹ *RATHBUN v. UNITED STATES*, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611, Black's Cas. Constitutional Law, 2d 356.

²⁰ *People ex rel. v. La Buy*, 285 Ill. 141, 120 N.E. 537; *Ex parte Bustillos*, 26 N.M. 449, 194 P. 886; *In re New Jersey Court of Pardons*, 97 N. J.Eq. 555, 129 A. 624; *Ex parte Garland*, 4 Wall. 333, 18 L.Ed. 366.

²¹ *Brown v. Walker*, 161 U.S. 591, 16 S.Ct. 644, 40 L.Ed. 819.

²² *The Laura*, 114 U.S. 411, 5 S.Ct. 881, 29 L.Ed. 147. Cf. *State v. Sloss*, 25 Mo. 291, 69 Am.Dec. 467.

²³ *Ex parte Lee*, 177 Cal. 690, 171 P. 958; *Com. v. Kalck*, 239 Pa. 533, 87 A. 61; *State ex rel. Bottomly v. District Court of Eighteenth Judicial Dist. in and for Blaine County*, 73 Mont. 541, 237 P. 525; *Miller v. State*, 149 Ind. 607, 49 N.E. 894, 40 L.R.A. 109; *Martin v. People*, 69 Colo. 60, 168 P. 1171; *Belden v. Hugo*, 88 Conn. 500, 91 A. 369; *State ex rel. Bottomly v. District Court of Eighteenth Judicial Dist. in and for Blaine County*, 73 Mont. 541, 237 P. 525.

²⁴ *State v. Peters*, 43 Ohio St. 629, 4 N.E. 81; *Nix v. James*, 9 Cir., 7 F. 2d 590.

LIMITATIONS ON THE JUDICIAL POWER

53. The judicial department may not interfere with the legislature, its officers or its procedure in its performance of its legislative functions.
54. The judicial department may not enjoin or compel members of the executive department in their exercise of their discretionary powers, but the decisions are in conflict as to its power to compel their performance of ministerial functions.
55. The courts have refused to adjudicate political questions, but no precise test of when a question is political is derivable from the decisions.

The principle of the separation of powers also operates to limit the judicial department in its relations with both the legislative and executive departments. It has no power to enjoin a legislative body from enacting a measure into law,²⁵ nor to compel it to perform duties imposed upon it by the constitution.²⁶ This is on the theory that the legislature's responsibility is solely political. An exception exists in those states that permit courts to enjoin steps in the process of amending constitutions, which is an act of law-making, at the instance of taxpayers.²⁷ Neither can the courts control the action of legislative officers relating to their legislative duties, nor control legislative procedure.²⁸ Their duty to pass on the constitutionality of statutes in cases before them often involves that of determining whether the constitutionally prescribed procedure for the enactment of legislation has been followed, but even here they have narrowly limited the scope of their inquiry by the rules that deal with the finality they accord formal legislative records, or by those that treat many of those requirements as directory rather than mandatory.²⁹ The decisions are not in accord on these matters,

²⁵ State ex rel. Better-Built Home & Mortgage Co. v. Davis, 302 Mo. 307, 259 S.W. 80; Missouri & K. I. R. Co. v. Olathe, C.C., 156 F. 624.

²⁶ Fergus v. Marks, 321 Ill. 510, 152 N.E. 557, 46 A.L.R. 960.

²⁷ Ellingham v. Dye, 178 Ind. 336, 99 N.E. 1, Ann.Cas.1915C, 200; Holmberg v. Jones, 7 Idaho 752, 65 P. 563.

²⁸ Fox v. Harris, 79 W.Va. 419, 91 S.E. 209; Ex parte Echols, 39 Ala. 698, 88 Am.Dec. 749.

²⁹ Kelley v. Marron, 21 N.M. 239, 153 P. 262; Yolo County v. Colgan, 132 Cal. 265, 64 P. 403, 84 Am.St.Rep. 41; Field v. Clark, 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294.

but most limit the extent of judicial inquiry in this matter to a considerable extent.³⁰

The principal limitations accepted by the courts on their power to control the executive department involve the extent of their power to enjoin or mandamus executive officials, and the doctrine of political questions. All cases agree that courts have no power to enjoin or compel the performance of acts that are of a political character or that involve the exercise of executive discretion.³¹ The cases are in conflict on their power to compel the chief executive or the principal executive officers to perform purely ministerial acts involving no discretion.³² Those that sustain the power do so on the theory that such officials are amenable to legal process to protect private rights affected by their refusal to act. Those that deny the existence of the power do so on the theory that such officials are politically responsible for their acts and that the courts would be powerless to compel obedience to their mandates. The immunity has never been extended to inferior members of the executive department. Its effect is to create a field of executive immunity from legal responsibility. The other limitation on the judicial power that operates to relieve the executive from judicial control is that involved in the doctrine of political questions. This doctrine has thus far appeared in two principal forms. The first is based on the theory that the constitution itself has given the ultimate decision on certain matters to a department other than the judicial, and that the court is bound by its answer thereto if the question arises in a case before the court. The application of this position is not difficult where the constitution has expressly so provided, but in the majority of cases the decision that a question is political in this sense is inferred from its essential nature. There exists no very definite test for determining when that inference is permissible with respect to any par-

³⁰ See W. F. Dodd, Judicially non-enforceable provisions of constitutions. 80 U. of Pa.L.Rev. 54.

³¹ *MISSISSIPPI v. JOHNSON*, 4 Wall. 475, 18 L.Ed. 437, Black's Cas. Constitutional Law, 2d 58; *State ex rel. Daly v. Henderson*, 199 Ala. 423, 74 So. 951.

³² Holding that mandamus lies; *Martin v. Ingham*, 38 Kan. 641, 17 P. 162; *Marbury v. Madison*, 1

Cranch 137, 2 L.Ed. 60; *Winsor v. Hunt*, 29 Ariz. 504, 243 P. 407. Holding that mandamus does not lie: *People ex rel. v. Dunne*, 258 Ill. 441, 101 N.E. 560, 45 L.R.A.,N.S., 500; *State ex rel. Attorney General v. Huston*, 27 Okl. 606, 113 P. 190, 34 L.R.A.,N.S., 380; *People ex rel. Sutherland v. The Governor*, 29 Mich. 320, 18 Am.Rep. 89; *Rice v. The Governor*, 207 Mass. 577, 93 N.E. 821, 32 L.R.A.,N.S., 355.

ticular act, but historical practice and custom are important factors in this connection. Among matters held political in this sense are who is the accredited minister from a foreign country,³³ the existence of a treaty,³⁴ the existence of a state of war,³⁵ which of competing state governments is the legal government,³⁶ and whether a state has a republican form of government.³⁷ It has been intimated that the court may pass on such questions in the absence of a determination by the proper parties.³⁸ The second form under which the doctrine has appeared is based on the character of the party and the interest the court is asked to protect. If the party is invoking judicial aid solely to protect its political power, the court will deny jurisdiction on the ground that it is being asked to decide a political question. The cases in which this theory has been applied have generally involved efforts of states of the United States to prevent the enforcement of acts of Congress claimed to infringe on the powers reserved to the states.³⁹ It should be noted that the doctrine in neither form prevents courts from protecting the private political rights of individuals. Furthermore if a state provides for the judicial determination of who is entitled to a political office, and a defense is interposed under the Constitution or laws of the United States, which is overruled, there is a case within federal judicial power.⁴⁰ In cases of the second type of political question referred to above it is the form in which the matter is presented, not its substance, that makes it a political question, and courts will pass on its substance whenever the issue comes before them in a justiciable form.⁴¹

³³ *In re Baiz*, 135 U.S. 403, 10 S.Ct. 854, 34 L.Ed. 222.

³⁴ *Terlinden v. Ames*, 184 U.S. 270, 22 S.Ct. 484, 46 L.Ed. 534.

³⁵ *Prize Cases*, 2 Black. 635, 17 L. Ed. 459.

³⁶ *LUTHER v. BORDEN*, 7 How. 1, 12 L.Ed. 581, Black's Cas. Constitutional Law, 2d 61.

³⁷ *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118, 32 S.Ct. 224, 56 L.Ed. 377.

³⁸ *Ex parte Cooper*, 143 U.S. 472, 12 S.Ct. 453, 36 L.Ed. 282.

³⁹ *Georgia v. Stanton*, 6 Wall. 50, 18 L.Ed. 721; *Massachusetts v. Mellon*, 262 U.S. 447, 43 S.Ct. 597, 67 L. Ed. 1078; *United States v. West Virginia*, 295 U.S. 463, 55 S.Ct. 789, 79 L.Ed. 1546.

⁴⁰ *Boyd v. Nebraska*, 143 U.S. 135, 12 S.Ct. 375, 36 L.Ed. 103; *Kennard v. Louisiana*, 92 U.S. 480, 23 L.Ed. 478; *Wilson v. North Carolina*, 169 U.S. 586, 18 S.Ct. 435, 42 L.Ed. 865; *In re Gunn*, 50 Kan. 155, 32 P. 470, 948, 19 L.R.A. 519.

⁴¹ The issue of whether federal legislation invades the reserved powers of the states, which Massachu-

LIMITATIONS ON THE EXECUTIVE POWER

56. The executive department may not assume the powers or functions of either of the other departments, nor direct or interfere with either in its exercise of its own functions.

The principal problem that has thus far arisen concerning interference by the executive department with the others has been that of the extent of the executive's power to pardon contempts of court. The executive's pardon power is usually limited to offenses against the state or the United States and to crimes. The problem has been to determine whether any contempts of court, and if so, which of them, constitute offenses or crimes. It has been held that contempts, even criminal contempts in which the proceeding is between the public and the defendant for the purpose of vindicating the authority of the court and punishing the act as a public wrong, are not crimes or offenses within the executive's pardon power.⁴² The act involved in the case first cited consisted in publishing scurrilous charges about the court because of a decision made by it. The weight of authority is against this position. The power to pardon has been held to extend to criminal contempts committed out of the court's presence,⁴³ to those committed in its presence,⁴⁴ and to those consisting in violations of its orders.⁴⁵ The distinctive feature of criminal contempt proceedings is their purpose to vindicate the court's authority and to punish the act as a public wrong as distinguished from a civil contempt proceeding whose aim is the enforcement of private rights as the court has determined them. It has been decided that the governor has no power to pardon a civil contempt, whether it be direct or

setts sought to raise in *Massachusetts v. Mellon*, will be passed on in a case properly before the courts.

⁴² *State v. Shumaker*, 200 Ind. 716, 164 N.E. 408, 65 A.L.R. 218; *Taylor v. Goodrich*, 25 Tex.Civ.App. 109, 40 S.W. 515; see also dictum in *State ex rel. Rodd v. Verage*, 177 Wis. 295, 187 N.W. 830, 23 A.L.R. 491.

⁴³ *Ex parte Hickey*, 4 Smedes & M., Miss., 751; *State v. Magee* Pub. Co., 29 N.M. 455, 224 P. 1028, 38 L.R.

A. 142; *Sharp v. State*, 102 Tenn. 9, 49 S.W. 752, 43 L.R.A. 788, 73 Am. St.Rep. 851.

⁴⁴ *Ex parte Magee*, 31 N.M. 276, 242 P. 332.

⁴⁵ *State ex rel. Van Orden v. Sauvinet*, 24 La.Ann. 119, 13 Am.Rep. 115; *EX PARTE GROSSMAN*, 267 U.S. 87, 45 S.Ct. 332, 69 L.Ed. 527, 38 A.L.R. 131, *Black's Cas. Constitutional Law*, 2d 65.

indirect.⁴⁶ This accords with the intimations found in decisions sustaining the power to pardon criminal contempts. The courts that sustain this latter emphasize the punitive character of the proceedings, the lack of jury trial therein, and the need for vesting in someone the power to correct abuses of the power of punishing contempts. Those denying it stress the need for judicial independence of the executive and the risks to the administration of justice from an abuse of the pardon power if extended to contempts of court. The question whether the pardon power extends to contempts of the legislative power has not yet been passed upon.

DELEGATION OF POWERS

57. A department may not delegate to other departments or to private persons the powers whose exercise has been conferred upon it by the relevant constitution.
58. The legislature may confer upon executive or administrative officials the power to ascertain the existence of facts on whose existence the legislative rule is to become operative as law.
59. It may also confer upon such officials the power of exercising administrative discretion in the execution of a legislatively prescribed policy if it itself has prescribed a sufficiently definite standard to guide and limit such officials in their exercise of such power.

The principle that power conferred upon a department by the constitution shall not be delegated by it to others represents another phase of the principle of the separation of powers. Delegation occurs only when the act that constitutes the delegation is that of the department whose functions are being delegated. It does not occur when one department seeks to confer upon another powers that belong to a department other than that which is seeking to make the transfer. The typical instance of the latter is legislation conferring certain classes of non-judicial powers on courts or judicial powers on a department other than the judicial. Legislation of the latter type involves an attempt by the legislature to redistribute powers, and would involve a case of delegation only if it were distributing a part of its own powers. The cases involving this have already been considered insofar as they involved attempts by the legislature to confer or impose non-

⁴⁶ State ex rel. Rodd v. Verage,
177 Wis. 295, 187 N.W. 830, 23 A.L.R.
491.

judicial powers on courts and judicial powers on others than the judicial department.

The principal problem of delegation of power has been that of the extent of the delegability of legislative power. It is only occasionally that a question of the constitutional validity of delegation of its authority by another department is passed on by the courts. It has been held that a governor cannot delegate to another the power to fix the conditions attached to the grant of a pardon where the constitution authorized him to grant conditional pardons.⁴⁷ The enactment of a law involves both the determination of what the rule shall be, and that such rule shall have the force of law. An invalid delegation may occur with respect to either element in the legislative process. The principle prohibiting the delegation of legislative power has been given an interpretation that would not unduly hamper the legislature in invoking the aid of other governmental departments in effectuating its policies,⁴⁸ nor deny to it the necessary resources for performing its function of laying down policies and establishing standards while leaving to selected instrumentalities their execution and application.⁴⁹ The issue in every case is whether the legislature has conferred too large a discretion on those charged by it in carrying out its policy. It may not delegate its power to make law, but may confer authority and discretion as to its execution, to be exercised under and in pursuance of the law.⁵⁰ A statute that confers upon an executive or administrative officer or board the power to ascertain the existence of facts upon whose existence the legislatively prescribed rule is to become operative delegates no legislative power to the officer or board.⁵¹ A statute of that character cannot be said to confer no discretion upon such officer or board, since he or it must exercise some discretion in determining whether the specified facts exist and considerable discretion

⁴⁷ *In re McKinney*, 3 W.W.Harr. 434, 33 Del. 434, 138 A. 649.

⁴⁸ *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 48 S.Ct. 348, 72 L.Ed. 624.

⁴⁹ *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446.

⁵⁰ *Cincinnati, W. & Z. R. Co. v. Clinton County Com'rs*, 1 Ohio St. 77.

⁵¹ *Field v. Clark*, 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294; *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 48 S.Ct. 348, 72 L.Ed. 624; *State ex rel. Wisconsin Inspection Bureau v. Whitman*, 196 Wis. 472, 220 N.W. 929; *State v. Thompson*, 160 Mo. 333, 60 S.W. 1077, 54 L.R.A. 950, 83 Am.St.Rep. 468; *The Brig Aurora v. U. S.*, 7 Cranch 382, 3 L. Ed. 378.

may have to be exercised because of the character of those facts. Thus the fact on which the President's power and duty to suspend the free entry of goods into the United States was conditioned was his being satisfied that foreign countries were imposing duties on the products of the United States which he deemed reciprocally unequal and unreasonable,⁵² and that on which his power to adjust rates under the Flexible Tariff Act depended was his finding that existing duties did not equalize cost differences between domestic goods and those produced in the principal competing foreign country.⁵³ The room for executive discretion in making such findings of fact is apparent. No invalid delegation exists, however, if those facts are indicated with sufficient definiteness to constitute a standard guiding and limiting the exercise of the executive's power. This is the problem of the sufficiency of the standard hereinafter more fully considered.

The legislature frequently finds it impossible or impracticable in the regulation of conduct and business to prescribe in detail the exact rule that it wishes to apply to the varying facts and circumstances of the cases which it wishes to include within its regulatory policy. It has met this problem by creating administrative boards charged with carrying its policy into execution in the specific cases intended to be covered, or by conferring such power and duty upon executive or administrative officers. Legislation of this type generally creates a field of administrative discretion exercisable by those charged with the execution of the law. Discretion is inevitably involved in determining the meaning of the legislative standard in its application to the specific case in which it is being enforced, and in deciding whether the facts and circumstances of such case warrant the execution of the legislative policy therein. The grant of discretion of the latter type is merely another case of conferring a power to find facts upon whose existence the legislature has made certain results depend and involves no invalid delegation of legislative power if the facts are indicated with sufficient definiteness.⁵⁴ The grant of discretion of the former type is valid if the legislature has laid down an intelligible and reasonably definite standard to limit and guide those who are to execute the legislatively es-

⁵² *Field v. Clark*, 143 U.S. 649, 12 S.Ct. 495, 38 L.Ed. 294.

⁵³ *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 48 S.Ct. 348, 72 L.Ed. 624.

⁵⁴ *Union Bridge Co. v. United States*, 204 U.S. 364, 27 S.Ct. 367, 51 L.Ed. 523.

tablished policy. The legislature itself must declare the policy and fix the legal principles which are to control in given cases.⁵⁵ There is an invalid delegation of legislative power where the standard is so indefinite as to confer practically unlimited discretion upon the administrators to determine either whether or not there shall be a law,⁵⁶ or what that law shall be.⁵⁷ There are no exact tests for determining whether the standard in a given case satisfies the constitutional standard of definiteness. It is largely a question of whether the language used in framing it, considering the context and the character of the legislation in connection with which it is employed, gives a reasonably clear indication of the legislative policy. The factors invoked by courts in deciding this matter include a consideration of the inherent necessities of governmental co-operation,⁵⁸ whether the statute has gone as far as reasonably practicable under the circumstances,⁵⁹ difficulties inhering in the problem dealt with by the legislation,⁶⁰ and the extent to which the sense and experience of men have given precision to general terms and made them certain and useful guides in reasoning and conduct.⁶¹ Statutes that condition the grant of licenses to conduct such businesses as those of loan brokers, insurance agents, and the like, on administrative findings of financial responsibility, experience, character or general fitness, are almost universally sustained as not invalid delegations of legislative power to the licensing authorities.⁶² There is no invalid delegation in conferring upon a board

⁵⁵ *Mutual Film Corp. v. Industrial Comm.*, 236 U.S. 230, 35 S.Ct. 387, 59 L.Ed. 552, Ann.Cas.1916C, 296; *State ex rel. Wisconsin Inspection Bureau v. Whitman*, 196 Wis. 472, 220 N.W. 929.

⁵⁶ *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446.

⁵⁷ *SCHECHTER POULTRY CORP. v. UNITED STATES*, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947, Black's Cas. Constitutional Law, 2d 72.

⁵⁸ *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 48 S.Ct. 348, 72 L.Ed. 624.

⁵⁹ *United States v. Chemical Foundation*, 272 U.S. 1, 47 S.Ct. 1, 71 L.

Ed. 131; *State ex rel. Wisconsin Inspection Bureau v. Whitman*, 196 Wis. 472, 220 N.W. 929.

⁶⁰ *Sears, Roebuck & Co. v. Federal Trade Comm.*, 7 Cir., 258 F. 307, 6 A.L.R. 358; *Bank of Italy v. Johnson*, 200 Cal. 1, 251 P. 784.

⁶¹ *Mutual Film Corp. v. Industrial Commission*, 236 U.S. 230, 35 S.Ct. 387, 59 L.Ed. 552, Ann.Cas.1916C, 296.

⁶² *State v. Thompson*, 160 Mo. 333, 60 S.W. 1077, 54 L.R.A. 950, 83 Am. St.Rep. 468; *Noble v. English*, 183 Iowa 893, 167 N.W. 629; *Com. v. Puder*, 261 Pa. 129, 104 A. 505; *Ex parte Kreutzer*, 187 Wis. 463, 204 N.W. 595.

the power to fix reasonable rates and to prevent by its orders unreasonably discriminatory rates or practices of public utilities.⁶³ The standard indicated by the requirement that licenses or permits may be granted only on the applicant's proof that public convenience and necessity will be promoted thereby is generally held to satisfy the constitutional standard of definiteness.⁶⁴ The decision of whether a tax shall be imposed and how it shall be measured may not be left to the practically unlimited discretion of administrative officers.⁶⁵ Greater latitude seems to be permitted in legislation not directly regulating private conduct but restricted to matters connected with the conduct of the government itself,⁶⁶ but even in this field is the grant of unregulated discretion held invalid.⁶⁷ It has recently been decided that Congress is not required to lay down narrowly definite standards in conferring upon the President powers of dealing with matters involving the nation's international relations.⁶⁸ This position was supported not only by considerations of policy but also by the argument that the President possesses an independent power to represent the nation in the field of international relations.

The making of rules and regulations to carry a legislative policy into execution differs from the application of said policy to a specific case only in that it defines the meaning of that policy in its application to a class of cases instead of to one case. The legislature does not invalidly delegate its legislative powers when it confers rule-making powers upon executive or administrative officials if it has furnished a sufficiently definite

⁶³ Railroad Commission Cases, 116 U.S. 307, 6 S.Ct. 334, 388, 1191, 29 L. Ed. 636.

⁶⁴ New York Cent. Security Corp. v. United States, 287 U.S. 12, 53 S.Ct. 45, 77 L.Ed. 138; State v. Darazzo, 97 Conn. 728, 118 A. 81; State ex rel. Kenosha Gas & Electric Co. v. Kenosha Electric Ry. Co., 145 Wis. 337, 129 N.W. 600; State ex rel. Dybdal v. State Securities Commission, 145 Minn. 221, 176 N.W. 759.

⁶⁵ Larabee Flour Mills Co. v. Nee, D.C., 12 F.Supp. 395; Vogt & Sons v. Rothensies, D.C., 11 F.Supp. 225.

⁶⁶ State ex rel. Board of Regents

of Normal Schools v. Zimmerman, 183 Wis. 132, 197 N.W. 823; Crawford v. Johnston, 177 S.C. 399, 181 S.E. 476; State ex rel. Farr v. Moorer, 152 S.C. 455, 150 S.E. 269.

⁶⁷ Smithberger v. Banning, 129 Neb. 651, 262 N.W. 492, 100 A.L.R. 686; Crane v. Frohmiller, 45 Ariz. 490, 45 P.2d 955; Portland v. Welch, 154 Or. 286, 59 P.2d 228. Contra to last case, Dunn v. City of Indianapolis, 208 Ind. 630, 196 N.E. 528, 698, 5 N.E.2d 629.

⁶⁸ United States v. Curtiss-Wright Export Corporation, 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255.

standard to guide and limit those officials in their exercise of that power.⁶⁹ The legislature may confer such power upon such officials regardless of the subject matter in respect of which it may be exercised by them. It extends to establishing classifications for carrying the legislative policy into execution.⁷⁰ It is valid to confer upon such officials the power to prescribe the qualifications that will satisfy the standard of professional competence established by the legislature in broad general terms,⁷¹ to fix subordinate standards that fill in the details of broadly phrased legislative standards,⁷² and generally to fill up the details in any legislatively prescribed plan of regulation by prescribing administrative rules and regulations.⁷³ The grant of said power constitutes an invalid delegation of the legislative function if the standard set by the legislature is too vague and indefinite and confers upon the administrators an unreasonable amount of discretionary power.⁷⁴ Courts do not always agree as to when that has occurred. Thus it has been held both valid⁷⁵ and invalid⁷⁶ to confer upon an administrative board the power to prescribe standard forms of insurance policies, and the same conflict exists as to how far the power to prescribe regulations governing the use of the public highways may be conferred upon an administrative official.⁷⁷ A rule or regulation that is not a proper interpretation of the legislative policy is void as

⁶⁹ *Dewey v. Richardson*, 206 Mass. 430, 92 N.E. 708; *McKinley v. United States*, 249 U.S. 397, 39 S.Ct. 324, 63 L.Ed. 668; *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 53 S.Ct. 42, 77 L.Ed. 175; *Bank of Italy v. Johnson*, 200 Cal. 1, 251 P. 784.

⁷⁰ *In re Opinion of the Justices*, 251 Mass. 569, 147 N.E. 681.

⁷¹ *In re Thompson*, 36 Wash. 377, 78 P. 899, 2 Ann.Cas. 149; *Ex parte Whitley*, 144 Cal. 167, 77 P. 879, 1 Ann.Cas. 13.

⁷² *State v. Johnson*, 75 Mont. 240, 243 P. 1073; *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 53 S.Ct. 42, 77 L.Ed. 175.

⁷³ *Kansas City Southern Ry. Co. v. United States*, 231 U.S. 423, 34 S.Ct. 125, 58 L.Ed. 296, 52 L.R.A., N.S., 1;

Shouse v. Moore, D.C., 11 F.Supp. 784.

⁷⁴ *Goodlove v. Logan*, 217 Iowa 98, 251 N.W. 39; *State ex rel. Davis v. Fowler*, 94 Fla. 752, 114 So. 435.

⁷⁵ *State ex rel. Wisconsin Inspection Bureau v. Whitman*, 196 Wis. 472, 220 N.W. 929; *New York Life Ins. Co. v. Hardison*, 199 Mass. 190, 85 N.E. 410, 127 Am.St.Rep. 478; *State ex rel. Martin v. Howard*, 96 Neb. 278, 147 N.W. 689.

⁷⁶ *King v. Concordia Fire Ins. Co.*, 140 Mich. 258, 103 N.W. 616, 6 Ann. Cas. 87; *O'Neil v. American Fire Ins. Co.*, 186 Pa. 72, 30 A. 943, 26 L.R.A. 715, 45 Am.St.Rep. 650.

⁷⁷ *Goodlove v. Logan*, 217 Iowa 98, 251 N.W. 39 (invalid); *State v. Dixon*, 335 Mo. 478, 73 S.W.2d 385 (valid).

being in excess of the administrator's authority, and an attempt to confer power to make such rules would be an invalid delegation of legislative authority.⁷⁸ Thus the legislature may not confer power to make rules that shall supersede the provisions of a statute.⁷⁹ The legislature may provide that the violation of administrative rules and regulations shall be punishable,⁸⁰ but it may not confer on the administrator the power to determine whether or not such violations shall be punishable.⁸¹ It should be noted that executive and administrative officers and boards are in substance exercising a delegated legislative power in exercising their discretionary and rule-making powers, but that the delegation involved therein is permissible in the sense that it is not in conflict with the constitutional principle against the delegation of legislative powers.⁸²

The grant to the legislature of a state's legislative power is generally construed to imply as one of its consequences that that body shall not delegate it even to the people. It is, therefore, generally held that the legislature may not refer to the people the decision on whether a general rule prescribed by it shall have the force of law, unless the constitution expressly provides for such referenda.⁸³ The view that such legislation is merely a special case of conditioning the application of a legislative rule upon the existence of a fact, the popular vote in its favor, has not prevailed. The rule is otherwise if the legislation relates to matters of local police, and in such cases the legislature may leave to a local referendum the question of whether it shall be in force in such local unit.⁸⁴ The real explanation of these decisions is that the principle against the delegation of legislative power is being construed in the light of the prevalence of local home rule in our systems of state government, rather than the unconvincing contention that such statutes confer no

⁷⁸ *In re Mellea*, D.C., 5 F.2d 687.

⁷⁹ *McKenney v. Farnsworth*, 121 Me. 450, 118 A. 237.

⁸⁰ *United States v. Grimaud*, 220 U.S. 506, 31 S.Ct. 480, 55 L.Ed. 563.

⁸¹ *People v. Ryan*, 267 N.Y. 133, 195 N.E. 822.

⁸² See remarks of Mr. Justice Cardozo in *Norwegian Nitrogen Products Co. v. United States*, 238 U.S. 294, 53 S.Ct. 350, 77 L.Ed. 796.

⁸³ Opinions of the Justices, 160 Mass. 586, 36 N.E. 488, 23 L.R.A. 113; *People ex rel. v. Barnett*, 344 Ill. 62, 176 N.E. 108, 76 A.L.R. 1044.

⁸⁴ *Dalby v. Wolf*, 14 Iowa 228; *Chicago v. Stratton*, 162 Ill. 494, 44 N.E. 853, 35 L.R.A. 84, 53 Am.St.Rep. 325; *Cincinnati, W. & Z. R. Co. v. Clinton County Com'rs*, 1 Ohio St. 77; *Locke's Appeal*, 72 Pa. 491, 13 Am.Rep. 716.

part of the legislative power on those voting in the local referendum. The same reason explains the rule that the delegation of local legislative powers to municipal corporations does not involve an invalid delegation of the legislature's law-making powers. Congress has the same power to confer legislative powers upon territorial legislatures.

The question has sometimes arisen as to how far the legislature of a state may condition the operative effect of statutes enacted by it on the action of the legislature or other departments of other states or the United States. A statute under which the amount of a tax payable to a state by foreign corporations doing business within it was conditioned on the treatment accorded similar corporations organized under its laws by the state of incorporation of such foreign corporations has generally been sustained as legislation contingent on a condition completely defined by the legislature of the state enacting the rule.⁸⁵ The legislature of a state may also provide that a statute enacted by it shall become operative when, or remain in effect only so long as, a given federal statute takes or remains in effect.⁸⁶ The general rule, however, is that it may not confer on the authorities of another state, or of the United States, the power to determine what shall be the rule in force in the state, or condition changes in its rule on changes in rules enacted by other states or the United States.⁸⁷ Neither may Congress delegate to a state the power to define the constitutional scope of federal admiralty power by giving effect to state workman's compensation acts in defining rights arising under admiralty law.⁸⁸ There is, however, no invalid delegation of its power in defining the character of prohibited interstate shipments by reference to state laws,⁸⁹ or the permissible exemptions under the Bankruptcy Act by reference thereto.⁹⁰ Such provisions do not transfer to the state the pow-

⁸⁵ *Phoenix Ins. Co. v. Welch*, 29 Kan. 672; *People v. Fire Ass'n of Philadelphia*, 92 N.Y. 311, 44 Am. Rep. 380. Contra, *Clark & Murrell v. Port of Mobile*, 67 Ala. 217.

⁸⁶ *State v. Brothers*, 144 Minn. 337, 175 N.W. 685.

⁸⁷ In re Opinion of the Justices, 239 Mass. 606, 133 N.E. 453; *State v. Gauthier*, 121 Me. 522, 118 A. 380, 26 A.L.R. 652; *Darweger v. Staats*, 267 N.Y. 290, 196 N.E. 61. Contra,

Com. v. Alderman, 275 Pa. 483, 119 A. 551.

⁸⁸ *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 40 S.Ct. 438, 64 L.Ed. 834, 11 A.L.R. 1145.

⁸⁹ *Clark Distilling Co. v. Western Md. Ry. Co.*, 242 U.S. 311, 37 S.Ct. 180, 61 L.Ed. 326, L.R.A.1917B, 1218, Ann.Cas.1917B, 845.

⁹⁰ *Hanover Nat. Bank v. Moyses*, 186 U.S. 181, 22 S.Ct. 857, 46 L.Ed. 1113.

er to determine the rule that shall apply, but only describe the situations that are within such rule. The legislature is also prohibited from delegating its powers to private persons or agencies,⁹¹ although, on the analogy of the "local option" cases, legislation has been sustained that required the consent of private persons affected thereby before a public official could grant relief from the provisions of municipal zoning ordinances.⁹² The exigencies of government and the desire to protect reasonable private interests have overcome the logical implications of a legal doctrine in such cases.

⁹¹ *Carter v. Carter Coal Co.*, 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160; *Johnson & Johnson v. Weissbard*, 120 N.J.Eq. 314, 184 A. 783; *Doubleday, Doran & Co., Inc. v. R. H. Macy & Co., Inc.*, 269 N.Y. 272, 199 N.E. 409, 103 A.L.R. 1325. Cf. *St. Louis, I. M.*

& S. Ry. Co. v. Taylor, 210 U.S. 281, 28 S.Ct. 616, 52 L.Ed. 1061.

⁹² *State ex rel. Standard Oil Co. v. Combs*, 129 Ohio St. 251, 194 N.E. 875; *Inspector of Buildings of Lowell v. Stoklosa*, 250 Mass. 52, 145 N.E. 262. Cf. *Cincinnati v. Cook*, 107 Ohio St. 223, 140 N.E. 655.

CHAPTER 4

RELATIONS BETWEEN NATION AND STATES

- 60-62. Federal System in General.
- 63-65. Scope of National Powers.
- 66-70. Scope of States' Powers.
- 71-73. Federal Property within States.
- 74-82. Reciprocal Immunity from Taxation.
- 83-86. State and Federal Interactions—Other Powers.
- 87-91. Federal Courts and State Law.
- 92-95. The Position of the States in the Union.

FEDERAL SYSTEM IN GENERAL

- 60. The Constitution has established a dual system of government for the people of the United States. There exist two governments within the territorial limits of each of the states, the national or federal government and the state government.
- 61. The national government operates as immediately upon persons and things within a state as does the government of that state.
- 62. The division of governmental powers between these two governments is effected by the Constitution of the United States.

The Constitution of the United States has established a federal system for the government of the people of the United States. The Constitution and the laws enacted in pursuance thereof constitute an integral part of the law in effect in each state by virtue of their own force and not merely by the sufferance of the state. The national government operates as directly and immediately upon the people and territory of each state as does its state government. There thus exist within each state two governments capable of exercising within it legislative, executive and judicial powers.¹ The sphere of each is determined by the federal Constitution which has distributed between them those portions of the sovereign power of the people of the United States which it has not reserved to the people. The general principle employed in interpreting that distribution is that

¹ Tarble's Case, 13 Wall. 397, 20 v. Butler, 297 U.S. 1, 56 S.Ct. 312, L.Ed. 597; Ex parte Siebold, 100 U. 80 L.Ed. 477, 102 A.L.R. 914. S. 371, 25 L.Ed. 717; United States

the national government possesses those powers only that have been expressly or impliedly delegated to it by the specific or general grants of power made by the Constitution to the several departments of that government, and that the states possess all others not expressly denied them although each state can exercise them only with respect to persons and things within its territorial jurisdiction.² It is this that is denoted by the statement that the national government is wholly one of delegated powers and that all powers not so delegated are reserved to the states unless expressly denied them or reserved to the people. The Constitution thus limits both the national government and the states to the exercise of those powers belonging to them under its distribution of powers, and, as a corollary thereto, makes each supreme within its constitutionally prescribed sphere. The subsequent discussion will consider these limits only insofar as they are based on this distribution of powers, leaving for later consideration those based on the various specific or general limitations on government found in the federal and state constitutions.

SCOPE OF NATIONAL POWERS

63. The fundamental principle defining the division of powers between the national and state governments is that the former government possesses only those powers that have been expressly or impliedly delegated to it by the Constitution.
64. The Constitution has expressly conferred upon Congress the general power of making all laws necessary and proper for carrying into execution all powers vested by it in the government of the United States. This express provision has been an important factor in developing the scope of the other particular powers conferred upon the national government, especially those conferred upon its legislative department.
65. The Congress may exercise its powers to prescribe for the areas within the national government's control regulations of the character that a state may prescribe within its field by exercises of its police power, but Congress may not exercise any of its powers primarily for the purpose of regulating matters whose regulation has been entrusted exclusively to the states.

² *MCCULLOCH v. MARYLAND*, 4 *States v. Cruikshank*, 92 U.S. 542, 23 Wheat. 316, 4 L.Ed. 579, Black's Cas. L.Ed. 588. Constitutional Law, 2d 96; United

The two governments exercise their respective powers over the same social and economic life within a state. The scope of action permissible under any power is a function of both the subject matter upon which it can operate and the character of regulation that can be imposed thereon under it. The basic principle that defines the relationship of the two governments is that any action of the national government that is within the scope of its delegated powers prevails over any state action in conflict therewith.³ This does not, however, define what lies within the scope of those powers. That can be determined only by construing the terms in which the Constitution has conferred those powers upon the several departments of the national government, and the limits on its action are those implicit therein. The powers belonging to a state are not enumerated in the Constitution, which merely reserves to it all powers other than those delegated to the national government, those expressly denied to a state, and those reserved to the people.⁴ The extent of the national government's powers is both the limit of its own powers, and the most important single factor in defining what lies within a state's reserved powers. The principles employed in determining what specific action lies within its delegated powers are thus the most important factors in defining the constitutionally established balance between the two governments.

The problem of the extent of the national government's powers arises most frequently in connection with its legislative powers. The majority of these are enumerated in Section 8 of Article I of the Constitution. The principal issue has been whether the terms of the grant shall be narrowly or broadly construed. The terms in which some of the powers are granted describe a much more extensive field of national power than those in which others are conferred, but none is conferred in terms so definite that its language indicates exactly and exhaustively what specific acts lie within or without it. The question of narrow or broad construction is as pertinent for those grants that describe a relatively limited field of national control as for those that define a wider sphere of national action. The Preamble to the Constitution announces the broad general objectives aimed at in establishing the Constitution. It is not, however, a grant of powers to the national government.⁵ That

³Ex parte Siebold, 100 U.S. 371, 25 L.Ed. 717.

⁴U.S.C.A.Const., Amend. 10.

⁵See statement in *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643, 3 Ann.Cas. 765.

government may promote those purposes only through its exercise of its delegated powers. The objects for which these were conferred upon it must generally be inferred from the terms in which they are granted. The full extent of those objects is not exhausted by enumerating the particular objects for which the separate powers were conferred. They may be derived by inference from the grant of two or more powers; the national government's power to establish a uniform national currency has been derived from its powers to borrow, to coin money, and others.⁶ They may be based on the fact that the Constitution has made the United States a sovereign and independent nation vested with the entire control of the international relations of its people; the national government's control over aliens has been supported on that basis.⁷ The extent of the national government's legislative powers is not limited to such legislation as is specifically indicated by the language in which its specific powers have been conferred. The Constitution expressly grants to Congress a general power to make all laws necessary and proper for carrying into execution not only its own other legislative powers but all other powers vested in the national government.⁸ Its implied powers are not limited to those that are indispensable to the effective exercise of its other powers, but include that of employing any means which are appropriate and plainly adapted to any legitimate end that it may realize through their exercise.⁹ The practices of other sovereign nations may form the basis for implying a national capacity for exercising a particular power in a given manner, but the national government possesses no inherent sovereign powers and may not exercise a power merely because other sovereign nations possess it.¹⁰ The existence of an emergency cannot effect a transfer to the national government of a power belonging to the states, but it would seem that it is not wholly to be ignored in determining whether particular national action is an appropriate

⁶ *Juilliard v. Greenman*, 110 U.S. 421, 4 S.Ct. 122, 28 L.Ed. 204; *Norman v. Baltimore & O. R. Co.*, 294 U.S. 240, 55 S.Ct. 407, 79 L.Ed. 885, 95 A.L.R. 1352.

⁷ *Fong Yue Ting v. United States*, 149 U.S. 698, 13 S.Ct. 1016, 37 L.Ed. 905. See also on the general proposition *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255.

⁸ U.S.C.A.Const., Art. I, Sec. 8, Cl. 18.

⁹ *McCULLOCH v. MARYLAND*, 4 Wheat. 316, 4 L.Ed. 579, *Black's Cas. Constitutional Law*, 2d 96; *Ruppert v. Caffey*, 251 U.S. 264, 40 S.Ct. 141, 64 L.Ed. 260.

¹⁰ *Kansas v. Colorado*, 206 U.S. 46, 27 S.Ct. 655, 51 L.Ed. 956.

means for promoting an objective which it lies within the competence of that government to promote. It thus becomes a factor in defining the actual scope of its implied powers.¹¹ It is unnecessary to invoke the principles that define the scope of implied powers where the specific national action is the very action indicated by the terms in which a power is granted. Thus the coinage of metallic moneys can be immediately derived from the grant of the power to coin money. It is only when the specific action is other than that thus indicated that the principle of implied powers serves as the mediating factor for connecting such action with the specific power or powers of which it is an exercise. The doctrine of implied powers has its most important application in developing the extent of national legislative powers, but is also employed in defining what particular action constitutes an exercise of the judicial power delegated to the national government.¹²

The increased social and economic integration of the nation that has occurred since the adoption of the Constitution has created many situations in which state action has been deemed inadequate to cope successfully with existing problems. This has frequently led to national legislation indirectly regulating matters that could not be directly regulated by the national government through an exercise of any of its delegated powers. The national powers that have been most frequently invoked for this purpose have been its postal, taxing and commerce powers. The postal power may be exercised by prohibiting the use of the mails to lottery tickets,¹³ and to unlicensed securities.¹⁴ The immediate field in which the regulations took effect was one subject to national control, but the main purpose of the regulations was not so much to exclude such articles from the mails as to employ such exclusion to reach objectives lying within a state's exclusive power. The use of the taxing power to force state banknotes out of circulation has been sustained although

¹¹ *Wilson v. New*, 243 U.S. 332, 37 S.Ct. 298, 61 L.Ed. 755, L.R.A.1917E, 938, Ann.Cas.1918A, 1024.

¹² *Michaelson v. United States ex rel. Chicago, St. P., M. & O. R. Co.*, 266 U.S. 42, 45 S.Ct. 18, 69 L.Ed. 162, 35 A.L.R. 451.

¹³ *In re Rapier*, 143 U.S. 110, 12 S.Ct. 374, 36 L.Ed. 93.

¹⁴ *Securities and Exchange Comm. v. Jones, D.C.*, 12 F.Supp. 210, affirmed, 2 Cir., 79 F.2d 617, reversed, on other grounds, 298 U.S. 1, 56 S.Ct. 654, 80 L.Ed. 1015. See also *Electric Bond & Share Co. v. Securities and Exchange Comm.*, 303 U.S. 419, 58 S.Ct. 678, 82 L.Ed. 936.

the decision was rested in part on other powers.¹⁵ A discriminatory excise tax on the sale of oleomargarine that seems to have been motivated by a desire to protect producers and sellers of butter has been held valid.¹⁶ The power to tax includes that of enacting any measure having a reasonable relation to its enforcement. This theory has been used to justify an elaborate system for regulating trade in narcotics whose undoubted aim was to regulate that traffic rather than the collection of revenue.¹⁷ Despite judicial intimations casting doubts on the decision in *United States v. Doremus*, the Supreme Court finally declined to overrule it.¹⁸ A purported exercise of the federal taxing power will be held invalid if it is clear from the face of the statute, from the impossibility of raising revenues under its operation, or from the close relation of the imposition to a regulatory scheme that could not be directly enforced by the national government, that its primary purpose is not revenue but the enforcement of such regulatory system.¹⁹ A special income tax on the net income of those knowingly employing children under specified ages in certain named industries, and prohibitive excises on speculative transactions in commodity markets which were integral parts of a system for the regulation of such markets, have been held invalid on these grounds.²⁰ Courts view the impositions in such cases as penalties rather than taxes, and invalid unless the national government has the power to directly enact and enforce the regulations for whose violation the penalties are imposed.²¹ The invalidity of the imposition may result not merely where the invalid regulation is effected through the imposition of the so-called tax, but also where it is effected through the expenditure of the funds raised therefrom.²²

¹⁵ *Veazie Bank v. Fenno*, 8 Wall. 533, 19 L.Ed. 482.

¹⁶ *McCray v. United States*, 195 U.S. 27, 24 S.Ct. 769, 49 L.Ed. 78, 1 Ann.Cas. 561.

¹⁷ *United States v. Doremus*, 249 U.S. 86, 39 S.Ct. 214, 63 L.Ed. 498.

¹⁸ *United States v. Daugherty*, 269 U.S. 360, 46 S.Ct. 156, 70 L.Ed. 309, 310; *Nigro v. United States*, 276 U.S. 332, 48 S.Ct. 388, 72 L.Ed. 600.

¹⁹ *CHILD LABOR TAX CASE*, 259 U.S. 20, 42 S.Ct. 449, 66 L.Ed.

817, 21 A.L.R. 1432, *Black's Cas. Constitutional Law*, 2d 183.

²⁰ *CHILD LABOR TAX CASE*, supra; *Hill v. Wallace*, 259 U.S. 44, 42 S.Ct. 453, 66 L.Ed. 822; *Trusler v. Crooks*, 269 U.S. 475, 46 S.Ct. 165, 70 L.Ed. 365.

²¹ *Carter v. Carter Coal Co.*, 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160.

²² *United States v. Butler*, 297 U.S. 1, 56 S.Ct. 312, 80 L.Ed. 477, 102 A.L.R. 914.

The national government may exercise its power to regulate interstate and foreign commerce to prohibit the movement of goods therein.²³ It may not, however, exercise that power in order to regulate matters whose regulation belongs exclusively to the states, as by prohibiting the interstate shipment of goods produced in factories employing child labor.²⁴ It may exercise this power in such manner as to assist a state in promoting a valid state policy by conditioning the exclusion of articles from interstate commerce on state action,²⁵ or by removing from certain articles the protection of the commerce clause at an earlier stage than would be the case therewith but for such action.²⁶ The reasoning of the cases leaves it in doubt as to how extensive this national power is. The formal factor that has been most generally relied upon in the decisions invalidating Congressional attempts to use the national government's postal, taxing and commerce powers to regulate matters held by those decisions to be within the exclusive regulatory powers of the states, has been the express reservation to the states of powers not delegated to the national government which is found in the Tenth Amendment to the federal Constitution. The use of the reservations made by the Tenth Amendment as an independent basis for limiting the scope of delegations made to the national government seems unwarranted. The more reasonable construction of that Amendment is that it merely made explicit a limitation in favor of the states that was already implicit in the general theory that the national government was one of delegated powers only. However, whatever the formal basis invoked, validity or invalidity seems to turn on whether the delegated powers are being exercised primarily to attain the national object for which they were conferred upon the national government or one whose promotion lies beyond the competence

²³ *Brooks v. United States*, 267 U. S. 432, 45 S.Ct. 345, 69 L.Ed. 699, 37 A.L.R. 1407; *Hipolite Egg Co. v. United States*, 220 U.S. 45, 31 S.Ct. 364, 55 L.Ed. 364.

²⁴ *Hammer v. Dagenhart*, 247 U.S. 251, 38 S.Ct. 529, 62 L.Ed. 1101, 3 A.L.R. 649, Ann.Cas.1918E, 724. See for further discussion of this matter Chapter 8, Sections 140-144.

²⁵ *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U.S. 311, 37 S.Ct. 180, 61 L.Ed. 326, L.R.A.1917B,

1218, Ann.Cas.1917B, 845; *United States v. Hill*, 248 U.S. 420, 39 S.Ct. 143, 63 L.Ed. 337; *KENTUCKY WHIP & COLLAR CO. v. ILLINOIS CENT. R. CO.*, 299 U.S. 334, 57 S.Ct. 277, 81 L.Ed. 270, Black's Cas. Constitutional Law 2d 230.

²⁶ *In re Rahrer*, 140 U.S. 545, 11 S.Ct. 865, 35 L.Ed. 572; *WHITFIELD v. STATE OF OHIO*, 297 U.S. 431, 56 S.Ct. 532, 80 L.Ed. 778, Black's Cas. Constitutional Law, 2d 293.

of that government. It is frequently difficult to decide this matter, particularly when the immediate field in which the act in question takes effect is that indicated by the terms in which the power purported to be exercised is granted. The legislative purpose becomes the dominant factor in the decision, and this readily accounts for such inconsistency as marks the decisions in this field. It is clear, however, that federal powers have been permitted to be exercised in many instances to achieve results that a state could achieve within its own boundaries through an exercise of its police power. There is, in that limited sense, a federal police power. It is not, however, an independent power, but rather denotes a power incidentally to promote such results so far as they lie within the range of its delegated powers.²⁷ The national government has never been held to possess a power directly or indirectly to regulate a matter involving the internal affairs of the nation, as distinguished from its foreign relations, merely because the individual states lacked power to deal adequately with it, and the theory has been several times rejected by the Supreme Court.²⁸

SCOPE OF STATES' POWERS

66. A state's powers include only those that the Constitution has neither delegated to the national government, nor expressly denied the states, nor reserved to the people.
67. A state law is unenforceable to the extent of its conflict with any valid exercise of any of its powers by the national government.
68. A state law is also unenforceable to the extent that its enforcement would conflict with the realization of the objectives intended to be protected or promoted by the grant of a power to the national government.

²⁷ Mr. Chief Justice Hughes has, however, described this process under the commerce power in the following language: "In doing this it (the federal government) is merely exercising the police power, for the benefit of the public, within the field of interstate commerce. KENTUCKY WHIP & COLLAR CO. v. ILLINOIS CENT. R. CO., 299 U.S. 334, 57 S.Ct. 277, 81 L.Ed. 270,

Black's Cas. Constitutional Law, 2d 230.

²⁸ *Kansas v. Colorado*, 206 U.S. 46, 27 S.Ct. 655, 51 L.Ed. 956. Compare argument of court in discussing basis and scope of the national government's power over foreign affairs in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255.

69. The classification of federal legislative powers into exclusive and concurrent powers has been developed in connection with the problem of determining the extent to which the mere grant of a power to the federal government, apart from any specific exercise thereof, operates as a limit on the powers of the states. The results of its employment conform with the principles stated in the two preceding paragraphs.
70. The Congress may, within limits, exercise its powers to relieve the states of what would otherwise be limits on their powers, and to assist them in realizing a legitimate local policy.

The foregoing considerations are important in defining the scope of a state's reserved powers because that depends upon the extent of the national government's powers. There are, however, problems involved in determining what specific state action lies within its reserved powers that can be solved only by invoking additional considerations. Any state action that conflicts with a valid exercise of any of its powers by the national government is unenforceable as long as the conflict endures, although it is not necessarily absolutely void so as to require reenactment when the barrier interposed by the federal action is removed. The limits on state action are, however, more extensive than those represented by actual exercises of its powers by the national government. The states are expressly prohibited from exercising certain powers.²⁹ The only problem to which such prohibitions give rise is whether specific state action falls within the prohibited class. A more important prohibition is that implied from the grant of so-called exclusive powers to the national government. Their exclusive character may result either from the specific terms in which they are conferred or from the fact that they are of such character as to be exercisable by a single authority only.³⁰ Their mere grant to the national government excludes them from the powers reserved to the states even in the absence of any exercise thereof by the former.³¹ The utility of this formal principle in deciding whether specific state action is valid or invalid is extremely limited since it furnishes no test for determining when state action constitutes an attempted exercise of one of these exclusive powers. There are no great difficulties when the state's action is the very action

²⁹ U.S.C.A.Const., Art. I, Sec. 10. 181; *Houston v. Moore*, 5 Wheat. 1, 5 L.Ed. 19.

³⁰ *STURGES v. CROWNINSHIELD*, 4 Wheat. 122, 4 L.Ed. 529, Black's Cas. Constitutional Law, 2d

³¹ *Chirac v. Chirac*, 2 Wheat. 259, 4 L.Ed. 234.

indicated by the express language of the national power, but the difficulties increase when the state's action is of the same or similar character as national action that could be implied from the grant of an exclusive power. It is also unnecessary since the limits imposed on a state's power by the grant of any power to the national government apply to every kind of power a state possesses so that the validity or invalidity of specific state action does not depend on whether it be viewed as an exercise of the same power as that conferred on the national government or of some power possessed by a state and exercisable by it within certain limits only. The ultimate issue is whether the particular state regulation unduly burdens or interferes with the realization of the national policies intended to be protected or promoted by the grant of such powers to the national government, not whether it is an exercise of a power exclusively conferred upon that government. It is on that basis that state action regulating the very subject matter that the national government had regulated under its exclusive war power has been sustained as a valid exercise of its police power.³² To state the problem as that of determining whether or not a state's action constitutes an exercise of an exclusive national power affects the form in which the answer is stated, but does not change the character of the problem or the factors affecting its solution.

The courts have developed the theory that there are certain powers belonging to the national government which a state may also exercise under certain circumstances and within certain limits. The mere grant of such a concurrent power to the national government does not prevent a state from exercising it to some extent. A state may not, however, exercise the whole part of such concurrent power which the national government has failed to exercise. State action may be invalid as an exercise of a concurrent power even though not in conflict with any national exercise thereof. The rule, as generally stated, is that the regulation of a subject matter which the national government might regulate under one of its concurrent powers is excluded from a state's reserved powers whenever the national government has indicated its intention to exclude it therefrom. It may indicate its intention either by affirmative action or by its non-action, but the latter has that effect only if the state regulation relates to a subject matter requiring uniform national

³² *Gilbert v. Minnesota*, 254 U.S.
325, 41 S.Ct. 125, 65 L.Ed. 287.

treatment.³³ The reasons invoked to define the latter resemble those relied on in determining whether state action conflicts with the grant of an exclusive power to the national government. A concurrent power is, to that extent, an exclusive power.³⁴ The concept of concurrent powers still constitutes an important analytical device employed in legal and judicial reasoning about the problem of the distribution of powers between nation and state. Its utility is negligible in many situations. It can be a theoretical basis for the inclusion of certain acts within the scope of a state's reserved powers, but the invalidity of a given state action cannot be deduced therefrom since that depends on establishing that such act was not within any power reserved to the states. The concept is also unnecessary to explain decisions sustaining state regulation of matters that could be regulated by the national government under such powers, since these can invariably be sustained as exercises of a state's police power within the limits imposed thereon by the existence or exercise of a co-existing national power over the same subject matter.

The situation may be briefly summarized as follows. The limits on a state's power resulting from the possession by the national government of any particular power cannot be satisfactorily derived from its exclusive or concurrent character. The attempt to determine whether a specific state regulation of a given subject matter is within that state's reserved powers through the employment of these concepts rather diverts attention from important considerations affecting the answer. These are to be found in the fact that the organic character of the social and economic life upon which both governments operate may result in projecting the effects of state regulation into a field within the national government's power of regulation so as to produce a conflict with a national policy evidenced either by the mere grant to that government of a power to control that field or by an actual exercise of one or more of its powers by that government. The validity or invalidity of the state regulation depends on the non-existence or existence of such conflicts. The issue is not whether the state regulation constitutes an exercise of the same or a similar power as that belonging to the na-

³³ *Cooley v. Board of Wardens of Port of Philadelphia* use of Society for Relief of D. P., 12 How. 299, 13 L.Ed. 996; *Bowman v. Chicago & N. W. Ry. Co.*, 125 U.S. 465, 8 S.Ct. 689, 1062, 31 L.Ed. 700.

³⁴ *Leisy v. Hardin*, 135 U.S. 100, 10 S.Ct. 681, 34 L.Ed. 128; *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U.S. 311, 37 S.Ct. 180, 61 L.Ed. 326, L.R.A.1917B, 1218, Ann. Cas.1917B, 845.

tional government, but whether it exceeds the limits imposed by the existence of the national government with its powers upon a state's exercise of every kind of power it possesses. The general tests of the existence or non-existence of the requisite kind and degree of conflict are the same whether an exclusive or concurrent national power is involved. The decision is the result of a process of balancing the interests that the state is seeking to protect or promote by its regulation as against the national interests that might be affected by its operation, and the distinction between exclusive and concurrent national powers is of minor importance in the process although it is still an element in the legal formulation of the problems, in the form of their solutions, and in the reasoning adduced to support the latter.

Congress has on several occasions relieved the states from a limit imposed on their powers by the grant of the power to regulate interstate commerce to the national government. The Supreme Court had construed that clause to prevent a state from prohibiting interstate sales of liquors within it and the sale thereof within it in the original package even after its interstate movement had wholly ended.³⁵ It was thereafter held that Congress might exercise its power to regulate interstate commerce so as to subject intoxicants to state prohibitory statutes upon their arrival within a state, or by prohibiting their interstate transportation into any state for sale or use therein in violation of its laws.³⁶ Legislation of this character applicable to prison-made goods has also been sustained.³⁷ Congress may, therefore, exercise its commerce power, in some cases at least, to aid a state in promoting a local policy by consenting to the enforcement of a state law that would be unenforceable but for such action. The original restriction on the states had been based on the theory that the commerce power, so far as this type of regulation was concerned, was an exclusive power which

³⁵ *Bowman v. Chicago & N. W. Ry. Co.*, 125 U.S. 465, 8 S.Ct. 689, 1062, 31 L.Ed. 700; *Lelsy v. Hardin*, 135 U.S. 100, 10 S.Ct. 681, 34 L.Ed. 128.

³⁶ *In re Rahrer*, 140 U.S. 545, 11 S.Ct. 865, 35 L.Ed. 572; *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U.S. 311, 37 S.Ct. 180, 61 L. Ed. 326, L.R.A.1917B, 1218, Ann.Cas. 1917B, 845; *United States v. Hill*,

248 U.S. 420, 39 S.Ct. 143, 63 L.Ed. 337.

³⁷ *WHITFIELD v. OHIO*, 297 U.S. 431, 56 S.Ct. 532, 80 L.Ed. 778, Black's Cas. Constitutional Law, 2d 293; *KENTUCKY WHIP & COLLAR CO. v. ILLINOIS CENT. R. CO.*, 299 U.S. 334, 57 S.Ct. 277, 81 L. Ed. 270, Black's Cas. Constitutional Law, 2d 230.

the states could not exercise without the assent of Congress. Under this theory the need for such ameliorating Congressional action exists only in respect of state action that would be invalid without it, and would exist whether such state action be deemed an attempt to exercise an exclusive or a concurrent national power. The important problems are to determine whether there are any limits on the power of Congress to exercise any of its powers in this manner and for this purpose, and how those limits are to be defined. There is no reason for believing that the commerce power is the only one capable of exercise in this manner and for this purpose. Nor are the decisions sustaining such exercises of the commerce power based on a general principle that it may be exercised to relieve the states of every restriction heretofore imposed on them by the commerce clause. They were originally based on the theory that Congress might have completely prohibited the interstate transportation of intoxicants. The basis for holding valid the statute depriving prison-made goods of the protection of the original package doctrine was that it affected a right whose exercise had never been regarded as a fundamental part of the interstate transaction but a mere incident thereof. This basis would justify a wide extension of this type of regulation. A principal reason for sustaining the prohibition of interstate shipments of prison-made goods into states where they were to be used or sold in violation of the laws of such states was that the states possessed the power to forbid traffic therein in their internal commerce. This conditioning of the valid scope of the federal commerce power upon the state's power to deal with a subject matter in its internal commerce may well expand the permissible scope of this type of regulation beyond that possible when the emphasis was placed on the power of the federal government to completely prohibit the interstate movement of the articles, broad as that power is.

FEDERAL PROPERTY WITHIN STATES

71. A state may not so exercise any of its powers as to hamper or interfere with the federal government's effective use of federally owned property situated within it.
72. The federal government has exclusive jurisdiction over all places purchased, by the consent of the legislature of the state in which such place is situated, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings.

73. The division of jurisdiction between state and nation over federally owned lands within a state if acquired by other means than purchase with the consent of the legislature of the state in which located, or if so purchased for purposes other than those specified in the preceding paragraph, depends upon the extent of jurisdiction ceded to the United States by the state, subject to the principle stated in paragraph 71.

The distribution of power between the federal and state governments that prevails generally within the territorial limits of a state is modified under some circumstances with respect to places therein owned by the United States. It is an invariable rule that a state is limited in exercising its jurisdiction over such places to such exercises thereof as will not interfere with or impair the federal government's effective use thereof, and of the structures thereon, for the purposes for which it acquired them.³⁸ No state can escape this minimum restriction on its powers by its own sole act, and it is doubtful that any organ of the federal government could relieve it therefrom. The extent of additional restrictions on a state's power over such places is, however, within the control of such state and dependent on its action in all cases except insofar as the federal government has reserved jurisdiction over such places at the time the state was admitted into the Union. The Constitution expressly confers upon Congress exclusive legislative power over all places purchased by the United States, with the consent of the legislature of the state in which they are situated, for the erection of forts, magazines, arsenals, dockyards and other needful buildings.³⁹ The consent of the state may be given either before or after the purchase and by either general or special legislation. The consent itself operates as a cession of exclusive legislative and judicial jurisdiction over such places by the very terms of the Constitution. It has been intimated that a consent so qualified as to defeat such exclusive jurisdiction would be void, but that the mere reservation of a right to execute the state's civil and criminal process within such place is not inconsistent with such exclusive jurisdiction.⁴⁰ The laws of a state have no legal force within places so acquired for such purposes by the United States.⁴¹ The purposes for which

³⁸ *United States v. Unzeuta*, 281 U. S. 138, 50 S.Ct. 284, 74 L.Ed. 761; *Ft. Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 5 S.Ct. 995, 29 L.Ed. 264.

⁴⁰ *United States v. Cornell*, Fed. Cas.No.14,867, 2 Mason 60.

⁴¹ *Surplus Trading Co. v. Cook*, 281 U.S. 647, 50 S.Ct. 455, 74 L.Ed.

³⁹ U.S.C.A.Const., Art. I, Sec. 8, Cl. 17.

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lands and buildings may be acquired with a resultant transfer of jurisdiction thereover to the United States, if the acquisition was by purchase with the consent of a state's legislature, include the maintenance of navy yards,⁴² military hospitals,⁴³ military reservations,⁴⁴ customs houses,⁴⁵ locks and dams for the improvement of navigation,⁴⁶ post-offices,⁴⁷ and soldiers' homes.⁴⁸ It has been recently stated that the expression "other needful buildings" includes whatever structures are necessary in the performance of its functions by the federal government.⁴⁹ The question whether a state has given its consent is itself a federal question.⁵⁰ The acquisition by the United States of places within a state for purposes of the kind mentioned in the constitutional provision referred to above by methods other than purchase with the consent of the state's legislature, or for other purposes by any method including purchase with such consent, does not alone transfer to the United States any jurisdiction thereover except such as is necessary to carry out the purposes for which they were acquired, nor deprive a state of any jurisdiction other than that whose exercise would interfere with realizing such federal purposes.⁵¹ A state may, however, cede a part of its jurisdiction over such places to the United States, and may attach to its cession any conditions not inconsistent with carrying out the purposes for which they were acquired.⁵² It may not attach such inconsistent conditions since it has no power to directly or indirectly interfere with the federal government's use of such places for the purposes for which it acquired them. The valid terms of a state's cession of jurisdiction define the distribution of governmental powers over such places between the two govern-

⁴² *Western Union Tel. Co. v. Chiles*, 214 U.S. 274, 29 S.Ct. 613, 53 L.Ed. 994.

⁴³ *Arlington Hotel Co. v. Fant*, 278 U.S. 439, 49 S.Ct. 227, 73 L.Ed. 447.

⁴⁴ *United States v. Unzeuta*, 281 U.S. 138, 50 S.Ct. 284, 74 L.Ed. 761.

⁴⁵ *Sharon v. Hill*, C.C., 24 F. 726.

⁴⁶ *United States v. Tucker*, D.C., 122 F. 518.

⁴⁷ *United States v. Andem*, D.C., 158 F. 996.

⁴⁸ *People v. Mouse*, 203 Cal. 782, 265 P. 944.

⁴⁹ *JAMES v. DRAVO CONTRACTING CO.*, 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155, 114 A.L.R. 318, *Black's Cas. Constitutional Law*, 2d 91.

⁵⁰ *Silas Mason Co. v. Tax Commission*, 302 U.S. 186, 58 S.Ct. 233, 82 L.Ed. 187.

⁵¹ *United States v. Unzeuta*, 281 U.S. 138, 50 S.Ct. 284, 74 L.Ed. 761; *Ryan v. State*, 188 Wash. 115, 61 P. 2d 1276.

⁵² *Arlington Hotel Co. v. Fant*, 278 U.S. 439, 49 S.Ct. 227, 73 L.Ed. 447.

ments.⁵³ A cession of this character may be made by the state at any time, and, being for the benefit of the United States, is presumed to be accepted by the latter. It cannot be recaptured by the sole act of the state after it has been accepted by the United States.⁵⁴ The contention that the United States has no power to accept exclusive jurisdiction over lands within a state acquired for purposes other than those specified in Article 1, Section 8, Clause 17, of the Constitution has recently been rejected.⁵⁵ The laws of a state that interfere with effectuating the purposes for which the United States thus acquires such places, and those dealing with matters over which jurisdiction has been ceded to the United States, have no legal force within places thus acquired by the United States.⁵⁶

RECIPROCAL IMMUNITY FROM TAXATION

74. Neither government may so exercise its taxing power as to unduly burden or hamper the performance of its governmental functions by the other.
75. A tax imposed by the one government is invalid if its effect upon the governmental functions of the other is immediate and direct, but valid if such effects are merely remote and indirect.
76. The taxation by the one government of the property used by the other in performing its functions, of the bonds of the other, of the income from such bonds, of the contracts of the other, and of any of the activities connected with the other's performance of its functions, is invalid.
77. The compensation paid to an officer or employee of the one government, and the income derived by any of its public instrumentalities from the performance of the governmental functions it was created to perform, may not be taxed by the other, but an independent contractor is not considered an officer or employee within this principle.

⁵³ *Palmer v. Barrett*, 162 U.S. 399, 16 S.Ct. 837, 40 L.Ed. 1015; *United States v. Unzeuta*, 281 U.S. 138, 50 S.Ct. 284, 74 L.Ed. 761.

⁵⁴ *United States v. Unzeuta*, 281 U.S. 138, 50 S.Ct. 284, 74 L.Ed. 761; *In re Ladd*, C.C., 74 F. 31.

⁵⁵ *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 58 S.Ct. 1009, 82 L.Ed. 1502.

⁵⁶ *Standard Oil Co. of California v. People of California*, 291 U.S. 242, 54 S.Ct. 381, 78 L.Ed. 775; *United States v. Unzeuta*, 281 U.S. 138, 50 S.Ct. 284, 74 L.Ed. 761.

78. The reciprocal immunity of each government from taxation by the other formerly extended to even private instrumentalities used by them in their performance of their respective governmental functions, but recent decisions have reversed several prior decisions so holding and indicate a trend in the direction of further reversals in this field.
79. The immunity conferred by these principles may not be defeated by resort to devices whose clear purpose is to reach a prohibited result by indirection, but the inclusion of a factor not directly taxable in the measure of a tax on a valid tax subject is permitted where no such purpose is intended.
80. The immunity of a state and its instrumentalities from federal taxation does not extend to its non-governmental functions and instrumentalities engaged therein, even when the income derived therefrom is used to support its governmental activities.
81. The federal government may confer upon private agencies and instrumentalities availed of by it to execute its powers an immunity from state taxation whenever the grant thereof is a necessary and proper means for executing any of its powers.
82. The extent to which each government may consent to waive its immunity from taxation by the other has not yet been definitely determined, but dicta announce that each may do so.

The discussion thus far has been concerned primarily with the principles defining the areas of control within which the federal government and states may exercise their respective powers in the regulation of persons and things within the territorial limits of a state. It is inevitable that the exercise of its powers by the one will at times affect the means and instrumentalities employed by the other in carrying out the functions it has assumed to perform. It has been shown by experience that this may result in imposing a serious burden upon the latter in carrying on its activities. The adjustment of conflicts of this character has been effected to a large extent through the development of the principle that neither the federal government nor a state may so exercise their respective powers as to unduly burden or impair the effective functioning of the other within its allotted sphere. The Constitution contains no express general limitation of this character, but it has been judicially developed as an inference from the necessities of the dual system of government

established by it.⁵⁷ The limits on the immunity of the agencies and instrumentalities of the one from action by the other are defined by the principle on which such immunity rests.⁵⁸ The purpose of conferring it is the protection of the functions of each government in its proper province.⁵⁹ It has, accordingly, been held that it cannot be invoked to protect a non-existent state power to control importations from a foreign country against an exertion of the federal power to regulate foreign commerce.⁶⁰ The denial of immunity to a state university's importation of scientific instruments for use in its educational activities was based on the theory that the claim to such immunity involved an attempt to exercise the federal government's exclusive and plenary power to control foreign commerce. The inference is plain that state immunity is non-existent where its allowance would involve permitting the state to directly or indirectly regulate a matter within exclusive federal control.⁶¹ The same test should apply in defining a limit on federal immunity from state action. The principal problem, however, has been to define the scope of, and limits on, the immunity of the one government where the only result of allowing it is the withdrawal of certain objects from the power of the other.

The problem has arisen most frequently in relation to the taxing powers of the federal and state governments. The general principle of immunity in this field was first applied to invalidate a state tax on the activities of a bank incorporated by Congress to serve as an instrumentality of the federal government.⁶² A state tax on such an agency was distinguished from a federal tax on a state agency in that the former was the act of a government in which the nation at large had no representation while the latter was that of a government in which all the states were represented. This factor has not, however, deter-

⁵⁷ *McCULLOCH v. MARYLAND*, 4 Wheat. 316, 4 L.Ed. 579, Black's Cas. Constitutional Law, 2d 96; *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 46 S.Ct. 172, 70 L.Ed. 384.

⁵⁸ *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 46 S.Ct. 172, 70 L.Ed. 384; *Indian Motorcycle Co. v. United States*, 283 U.S. 570, 51 S.Ct. 601, 75 L.Ed. 1277.

⁵⁹ *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 46 S.Ct. 172, 70 L.Ed. 384.

⁶⁰ *Board of Trustees of University of Illinois v. United States*, 289 U.S. 48, 53 S.Ct. 509, 77 L.Ed. 1025.

⁶¹ See *Merchants' Nat. Bank v. United States*, 101 U.S. 1, 25 L.Ed. 979.

⁶² *McCULLOCH v. MARYLAND*, 4 Wheat. 316, 4 L.Ed. 579, Black's Cas. Constitutional Law, 2d 96.

mined the actual development of the immunity principle. The principle of immunity has been extended to protect the states and their instrumentalities from federal taxation although to a somewhat lesser extent than that accorded the federal government.⁶³ The functions of a government are carried on through its officers, employees, and other agencies and instrumentalities, and their execution involves a variety of activities. They have been classified into strictly governmental and proprietary or non-governmental functions. The scope of the immunity in relation to the former will be first considered. It depends ultimately upon the effect of the tax upon the functions of the government claimed to be affected by it. It does not include protection against a tax whose effect upon the exercise of a governmental function is indirect and remote, but is limited to protection against taxes whose effect thereon is immediate and direct.⁶⁴ Important factors in determining whether the effects are immediate and direct or remote and indirect are the subject upon which the tax is imposed and the relationship between the government and the instrumentality subjected to the tax. Neither government is permitted to tax the other's selection of its officers, employees and other instrumentalities, nor the performance of their public duties or functions by those officers, employees, or instrumentalities.⁶⁵ The property owned by each and used in its exercise of its essential governmental functions may not be taxed by the other,⁶⁶ and this includes that owned and used by a corporation created to perform that function all of whose shares are owned by such government.⁶⁷ The obligations issued by the one government in exercising its power to borrow are its instrumentalities. Their issuance may not be taxed by the other government, their ownership may not be taxed directly or indirectly by it,⁶⁸

⁶³ *Collector v. Day*, 11 Wall. 113, 20 L.Ed. 122.

⁶⁴ *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 46 S.Ct. 172, 70 L.Ed. 384.

⁶⁵ *Ambrosini v. United States*, 187 U.S. 1, 23 S.Ct. 1, 47 L.Ed. 49; *McCulloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579; *Western Union Tele. Co. v. Texas*, 105 U.S. 460, 26 L.Ed. 1067.

⁶⁶ *Van Brocklin v. Tennessee*, 117 U.S. 151, 6 S.Ct. 670, 29 L.Ed. 845; *Lee v. Osceola & Little River Road*

Imp. Dist. No. 1, 268 U.S. 643, 45 S.Ct. 620, 69 L.Ed. 1133.

⁶⁷ *Clallam County v. United States*, 263 U.S. 341, 44 S.Ct. 121, 68 L.Ed. 328; *New Brunswick v. United States*, 276 U.S. 547, 48 S.Ct. 371, 72 L.Ed. 693. Compare *Wisconsin Cent. R. Co. v. Price County*, 133 U.S. 496, 10 S.Ct. 341, 33 L.Ed. 687; *Baltimore Shipbuilding & Dry Dock Co. v. Baltimore*, 195 U.S. 375, 25 S.Ct. 50, 49 L.Ed. 242; *Irwin v. Wright*, 258 U.S. 219, 42 S.Ct. 293, 66 L.Ed. 573.

⁶⁸ *Weston v. Charleston*, 2 Pet. 449,

nor may it subject the interest thereon to its income tax.⁶⁹ The same immunity extends to its formation of other contracts and its entrance into other transactions incident to its exercise of its sovereign powers. These are immune from sales and excise taxes imposed by the other government.⁷⁰ If, however, the activities are such as would ordinarily be considered not essentially governmental, they may be subjected to an excise tax even though conducted as an integral part of a governmental function to defray the cost of which the revenues therefrom are devoted. It was in part upon this theory that the federal admissions tax was held validly imposed upon admissions to intercollegiate athletic contests conducted as part of a state university's department of physical education.⁷¹ The tax in question was required to be collected from, and paid by, the person purchasing the right to be admitted to such contests. The leases through which the federal government has exercised its guardianship over the Indians and their property,⁷² and those through which states have developed lands owned by them in trust for specific essential governmental purposes, such as school lands, have been held instrumentalities employed by such governments in exercising

⁶⁹ L.Ed. 481; *Farmers' & Mechanics' Sav. Bank v. Minnesota*, 232 U.S. 516, 34 S.Ct. 354, 58 L.Ed. 706; *Home Savings Bank v. Des Moines*, 205 U.S. 503, 27 S.Ct. 571, 51 L.Ed. 901.

⁶⁹ *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 15 S.Ct. 673, 39 L.Ed. 759. It has been stated that the adoption of the 16th Amendment has not brought within the federal taxing power anything not within it prior to its adoption; *Evans v. Gore*, 253 U.S. 245, 40 S.Ct. 550, 64 L.Ed. 887, 11 A.L.R. 519.

⁷⁰ *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 48 S.Ct. 451, 72 L.Ed. 857, 56 A.L.R. 583; *Western Union Teleg. Co. v. Texas*, 105 U.S. 460, 26 L.Ed. 1067; *Williams v. Talladega*, 226 U.S. 404, 33 S.Ct. 116, 57 L.Ed. 275; *Graves v. Texas Co.*, 298 U.S. 393, 56 S.Ct. 818, 80 L.Ed. 1236; *Indian Motorcycle Co. v. United States*, 283 U.S. 570, 51

S.Ct. 601, 75 L.Ed. 1277. Cf. *Liggett & Myers Tobacco Co. v. United States*, 299 U.S. 383, 57 S.Ct. 239, 81 L.Ed. 294.

⁷¹ *Allen v. Regents of University System of Georgia*, 304 U.S. 439, 58 S.Ct. 980, 82 L.Ed. 1448.

⁷² *Indian Territory Illuminating Oil Co. v. Oklahoma*, 240 U.S. 522, 36 S.Ct. 453, 60 L.Ed. 779; *Jaybird Mining Co. v. Weir*, 271 U.S. 609, 46 S.Ct. 592, 70 L.Ed. 1112; *Gillespie v. Oklahoma*, 257 U.S. 501, 42 S.Ct. 171, 66 L.Ed. 338; *Choctaw, O. & G. R. Co. v. Harrison*, 235 U.S. 292, 35 S.Ct. 27, 59 L.Ed. 234. Cf. *Indian Territory Illuminating Oil Co. v. Board of Equalization of Tulsa County*, 288 U.S. 325, 53 S.Ct. 388, 77 L.Ed. 812. The case of *Gillespie v. Oklahoma* was expressly overruled in *Helvering v. Mountain Producers Corp.*, 303 U.S. 376, 58 S.Ct. 623, 82 L.Ed. 907.

essential governmental functions.⁷³ The immunity from taxation based on that fact, which former decisions had established, has recently been rejected so far as the tax was upon a private instrumentality. The theory was adopted that a non-discriminatory tax thereon did not so directly burden the governmental activity involved as to defeat the tax. A federal income tax upon the net income of the lessee of state school lands was, therefore, held valid.⁷⁴ The decision expressly over-ruled *Gillespie v. Oklahoma* and *Burnet v. Coronado Oil & Gas Co.*, and by implication must be deemed to have over-ruled many other prior decisions in this field. The theory in the earlier cases had been that the invalidated taxes operated immediately upon essential elements in the conduct of governmental activities, and that the tax on such instrumentalities or transactions was a tax on the power to employ the former or engage in the latter, even where the tax was imposed, not upon the government in whose right the immunity was claimed, but upon the private agency with which it dealt or which it was employing.

The officers and employees of a government, the private instrumentalities employed by it, and those with whom it deals as an incident to the exercise of its governmental functions, generally derive a private benefit from these relationships with it. An important, but not exclusive, factor that has been employed to determine whether a tax imposed thereon by the other government amounted to a direct or indirect burden on the former's functions has been the relationship between it and those agencies. Its officers and employees are held to constitute so integral a part of the governmental machinery through which it directly exercises its sovereign powers that their income from their office or employment may not be taxed by the other.⁷⁵ This immunity has not been extended to independent contractors with it.⁷⁶ In one such case the Court based its decision in part upon the fact

⁷³ *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 52 S.Ct. 443, 76 L.Ed. 815. Cf. Group No. 1 Oil Corp. v. Bass, 283 U.S. 279, 51 S.Ct. 432, 75 L.Ed. 1032. The case first cited was expressly overruled in *Helvering v. Mountain Producers Corp.*, 303 U.S. 376, 58 S.Ct. 623, 82 L.Ed. 907.

⁷⁴ *Helvering v. Mountain Producers Corp.*, 303 U.S. 376, 58 S.Ct. 623, 82 L.Ed. 907.

⁷⁵ *Dobbins v. Com'rs of Erie County*, 16 Pet. 435, 10 L.Ed. 1022; *Collector v. Day*, 11 Wall. 113, 20 L.Ed. 122.

⁷⁶ *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 46 S.Ct. 172, 70 L.Ed. 384; *JAMES v. DRAVO CONTRACTING CO.*, 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155, 114 A.L.R. 318, *Black's Cas. Constitutional Law*, 2d 91.

that the compensation subjected to a federal income tax was not derived from the state but paid out of the assets of the corporation being liquidated by a state board by which the taxpayer had been appointed.⁷⁷

The scope of the immunity is not, however, limited to cases in which are present the formal factors on which it was based in the cases thus far considered. The imposition of a tax by the one government may in fact result in unduly burdening or interfering with the performance of its functions by the other in situations in which those formal factors are not present. The hampering effect upon the efforts of the United States to secure the best terms for its Indian wards of a tax on the net income derived by a lessee from operations under a lease executed by the United States in carrying out its guardianship of the Indians was the principal basis for holding such tax invalid, and, while that decision has been over-ruled, it was on the basis of a changed view as to the actual effects of the tax upon the governmental activity involved.⁷⁸ Direct burdens have at times been found by the courts in situations in which the probable effects of the tax would have been rather slight. The mere possibility that a purchaser of state lands might reduce his price by reason of the liability of the income to be derived from their use to federal income tax has been held an insufficient basis for inferring a burdensome interference with the exercise of the state's function of promoting education through the sale of such lands.⁷⁹ A tax on the net income derived by an independent contractor from his government contract has been held valid because it did not in any substantial manner impair either the contractor's ability to discharge his obligations to his government employer or that of the government to procure the aid of private individuals to aid it in its undertakings.⁸⁰ It was the failure of the taxpayer to show that a tax on gains derived by investors from the sale of state bonds affected the borrowing power of states adversely that contributed to judicial approval of a federal income tax on such gains.⁸¹ State taxes on the gross earnings derived

⁷⁷ *Helvering v. Therrell*, 303 U.S. 218, 58 S.Ct. 539, 82 L.Ed. 758.

283 U.S. 279, 51 S.Ct. 432, 75 L.Ed. 1032.

⁷⁸ *Gillespie v. Oklahoma*, 257 U.S. 501, 42 S.Ct. 171, 66 L.Ed. 338; overruled in *Helvering v. Mountain Producers Corp.*, 303 U.S. 376, 58 S.Ct. 623, 82 L.Ed. 907.

⁸⁰ *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 46 S.Ct. 172, 70 L.Ed. 384.

⁸¹ *Willcuts v. Bunn*, 282 U.S. 216, 51 S.Ct. 125, 75 L.Ed. 304, 71 A.L.R. 1260.

⁷⁹ *Group No. 1 Oil Corp. v. Bass*,

from public contracts have been held valid,⁸² and excise taxes on transactions incidental to the performance of their contracts have also been sustained.⁸³ The reasoning in some of these cases suggests that the test to be applied is a factual one, but even here the tendency to generalize on the basis of the character of the tax in determining its practical effects upon the functions of government has not been wholly avoided.

It has been frequently asserted by courts that the immunity conferred by the principle under consideration may not be defeated by resort to indirection. Practically every effort to do so has involved an indirect attempt to tax the capital value of, or interest on, governmental securities. A principal device employed has been to use their value or income in measuring a tax on a tax subject admittedly within the taxing power of the government imposing the tax. A state corporate franchise tax measured by capital stock was sustained even though a portion of the capital stock was invested in federal bonds for the reason that the tax was not on the bonds but on the franchise.⁸⁴ The fact that the tax was not on the bonds but on the exercise of a privilege has also been made the basis for imposing state inheritance taxes on bequests to the United States⁸⁵ and on bequests consisting of federal bonds,⁸⁶ for subjecting bequests to a municipality to a federal inheritance tax,⁸⁷ and for including state bonds in the gross estate in computing the federal estate tax.⁸⁸ The constitutional immunity of the interest on state bonds is not invaded by including such interest in computing the net income that measures a federal excise tax on corporations.⁸⁹ It has, however, been held that where the legislative intent is clear to tax the interest on federal bonds its inclusion in the measure of a state tax on corporate franchises is invalid.⁹⁰ The

⁸² *JAMES v. DRAVO CONTRACT-ING CO.*, 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155, 114 A.L.R. 318, Black's Cas. Constitutional Law, 2d 91.

⁸³ *Trinity Farm Const. Co. v. Grosjean*, 291 U.S. 466, 54 S.Ct. 469, 78 L.Ed. 918.

⁸⁴ *Home Ins. Co. v. New York*, 134 U.S. 594, 10 S.Ct. 593, 33 L.Ed. 1025.

⁸⁵ *United States v. Perkins*, 163 U.S. 625, 16 S.Ct. 1073, 41 L.Ed. 287.

⁸⁶ *Plummer v. Coler*, 178 U.S. 115, 20 S.Ct. 829, 44 L.Ed. 993.

⁸⁷ *Snyder v. Bettman*, 190 U.S. 249, 23 S.Ct. 803, 47 L.Ed. 1035.

⁸⁸ *Greiner v. Lewellyn*, 258 U.S. 384, 42 S.Ct. 324, 66 L.Ed. 676.

⁸⁹ *Flint v. Stone Tracy Co.*, 220 U.S. 107, 31 S.Ct. 342, 55 L.Ed. 389, Ann.Cas.1912B, 1312.

⁹⁰ *Macallen Co. v. Massachusetts*, 279 U.S. 620, 49 S.Ct. 432, 73 L.Ed. 874, 65 A.L.R. 866.

Supreme Court, however, subsequently reaffirmed the importance of the distinction between tax subject and tax measure in sustaining the inclusion of copyright royalties in the measure of a state tax on corporate franchises.⁹¹ The decision expressly overruled a prior decision holding a direct state income tax on such royalties invalid.⁹² The formal fact that the government securities or their income are not the immediate subject of the tax, but enter only as elements in its measurement, is still an important factor for determining whether the tax imposes an immediate or remote burden upon the functions of the government in whose right immunity is claimed. The problem has also arisen where the taxing statute conditions exemptions from tax, or deductions permitted to be made in computing taxes, on the ownership of government securities or the receipt of interest thereon. The Supreme Court has been exceedingly alert to detect in these devices an attempt to reach a prohibited result by indirection, and to discover therein a hostile discrimination against these governmental instrumentalities.⁹³ It has held invalid a provision of a state income tax act which amounted to denying shareholders the privilege of deducting dividends to the extent that they were paid from surplus accumulated from interest on federal bonds,⁹⁴ and a provision in a federal income tax under which a permitted deduction was diminished by the amount of the interest derived by the taxpayer from interest on state bonds.⁹⁵ The decisions in this field have to some extent transformed a constitutional immunity from taxation into a basis for according to owners of such securities affirmative privileges instead of mere immunity with respect to their ownership thereof. All the decisions agree that any device adopted is invalid if the intent is clear to use it to reach such securities or their income by indirection, or if its practical effect is a discrimination against the securities of the one government by the ac-

⁹¹ *Fox Film Corp. v. Doyal*, 286 U. S. 123, 52 S.Ct. 546, 76 L.Ed. 1010.

⁹² See *Long v. Rockwood*, 277 U.S. 142, 48 S.Ct. 463, 72 L.Ed. 824.

⁹³ *National Life Ins. Co. v. U. S.*, 277 U.S. 508, 48 S.Ct. 591, 72 L.Ed. 963; *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313, 50 S.Ct. 326, 74 L.Ed. 870; *Miller v. Milwaukee*, 272 U.S. 713, 47 S.Ct. 280, 71 L.Ed. 487; *Northwestern Mut.*

Life Ins. Co. v. Wisconsin, 275 U.S. 136, 48 S.Ct. 55, 72 L.Ed. 202. Cf. *Denman v. Slayton*, 282 U.S. 514, 51 S.Ct. 269, 75 L.Ed. 500; *Philadelphia F. & M. Ins. Co. v. U. S.*, Ct.Cl., 3 F.Supp. 655.

⁹⁴ *Miller v. Milwaukee*, *supra*, footnote 93.

⁹⁵ *National Life Ins. Co. v. United States*, *supra*, footnote 93.

tion of the other.⁹⁶ The absence of both of these conditions will usually render the device valid.

The division of the functions of government into those that are strictly governmental and those that are proprietary or non-governmental was developed in connection with the problem of the liability of municipal corporations for the torts of their agents. A distinction between the various functions of a state formulated in practically the same terms was made in sustaining a federal excise tax on the activities of the agents employed by a state in the conduct of its liquor dispensary system.⁹⁷ The principal reason for the decision was that the extension of the immunity to such an activity would put it within the power of the states, by going into business, to practically destroy the federal government by the consequent impairment of its sources of revenue. The principles that determine whether a state activity is governmental or proprietary in this connection are not necessarily those developed in connection with the problem of a municipality's liability for the torts of its agents. The principal test is whether the state is engaging in a business which constitutes a departure from the usual governmental functions and to which, by reason of its nature, the federal taxing power would normally extend.⁹⁸ Its immunity from federal taxation does not include freedom from federal excises on its conduct thereof.⁹⁹ The net income of its private instrumentalities from their operations as such, and the compensation of its officers and employees connected with a state's operation of such a business, may be subjected to a federal income tax.¹ The implications of the reasoning on which these decisions rest would involve a denial of immunity regardless of the character of the tax and the particular manner of its incidence upon such state activities. Among the state activities that have been held not immune from federal taxation are the operation of liquor stores,² banks,³ and

⁹⁶ *Schuykill Trust Co. v. Pennsylvania*, 296 U.S. 113, 56 S.Ct. 31, 80 L.Ed. 91.

⁹⁷ *State of South Carolina v. United States*, 199 U.S. 437, 26 S.Ct. 110, 50 L.Ed. 261, 4 Ann.Cas. 737.

⁹⁸ *Helvering v. Powers*, 293 U.S. 214, 55 S.Ct. 171, 79 L.Ed. 291.

⁹⁹ *STATE OF OHIO v. HELVERING*, 292 U.S. 360, 54 S.Ct. 725, 78

L.Ed. 1307, *Black's Cas. Constitutional Law*, 2d 102; *State of North Dakota v. Olson*, 8 Cir., 33 F.2d 848.

¹ *Burnet v. A. T. Jergins Trust*, 288 U.S. 508, 53 S.Ct. 439, 77 L.Ed. 925; *Helvering v. Powers*, 293 U.S. 214, 55 S.Ct. 171, 79 L.Ed. 291.

² *Ohio v. Helvering*, 292 U.S. 360, 54 S.Ct. 725, 78 L.Ed. 1307.

³ *State of North Dakota v. Olson*, 8 Cir., 33 F.2d 848.

street railways;⁴ among those held not to have lost immunity on this basis are the operation of waterworks,⁵ ferries,⁶ hospitals,⁷ and schools.⁸ A state activity is not removed from the class of those denied immunity merely because the state has the power to undertake it, because it has undertaken it to promote a public interest, or because it constitutes a method for exercising its police power.⁹ It has been stated that the purpose of the immunity accorded state governmental activities was to protect the state from destruction by federal taxation of "those governmental functions which they were exercising when the Constitution was adopted and which were essential to their continued existence."¹⁰ This is at least an intimation that it may ultimately be held within those limits. This would involve the over-ruling of many decisions now deemed to be law. It has been held that when a state embarks in a business which would normally be taxable by the federal government, the fact that in so doing it is exercising a governmental power does not render the activity immune from federal taxation, even though its revenues are applied to defray the expenses of an essential governmental function.¹¹ The immunity of the federal government from state taxation seems not to be lost with respect to activities which would be considered non-governmental if carried on by a state. It has been stated that every activity of the federal government is the exercise of a public, governmental function, and that the distinction made with respect to state activi-

⁴ *Helvering v. Powers*, 293 U.S. 214, 55 S.Ct. 171, 79 L.Ed. 291.

⁵ *Brush v. Commissioner of Internal Revenue*, 300 U.S. 352, 57 S.Ct. 495, 81 L.Ed. 691, 108 A.L.R. 1428. This case was in effect overruled in *HELVERING v. GERHARDT*, 304 U.S. 405, 58 S.Ct. 969, 82 L.Ed. 1427, Black's Cas. Constitutional Law, 2d 105.

⁶ *United States v. King County*, 9 Cir., 281 F. 686.

⁷ *Mallory v. White*, D.C., 8 F.Supp. 989.

⁸ *Hoskins v. Commissioner of Internal Revenue*, 5 Cir., 84 F.2d 627.

⁹ *STATE OF OHIO v. HELVER-*

ING, 292 U.S. 360, 54 S.Ct. 725, 78 L.Ed. 1307, Black's Cas. Constitutional Law, 2d 102; *Helvering v. Powers*, 293 U.S. 214, 55 S.Ct. 171, 79 L.Ed. 291.

¹⁰ *HELVERING v. GERHARDT*, 304 U.S. 405, 58 S.Ct. 969, 82 L.Ed. 1427, Black's Cas. Constitutional Law, 2d 105; (sustaining federal income tax on salary of general engineer of New York-New Jersey Port Authority).

¹¹ *Allen v. Regents of University System of Georgia*, 304 U.S. 439, 58 S.Ct. 980, 82 L.Ed. 1448 (sustaining federal admissions tax on admissions charged by a state university to athletic contests conducted as part of its physical education program).

ties has no application to those of the federal government.¹² There have, as yet, been no authoritative determinations of this issue. It has, however, been held that a federally owned corporation primarily designed and employed to assist the federal government in performing an admittedly governmental function is itself a federal instrumentality, and that its incidental use of its facilities for private business purposes did not deprive it of that character since its primary purpose was legitimately governmental. Its immunity from state taxation was held to prevent the imposition of a state income tax upon the fixed salary of its general counsel.¹³ The Court's reasoning in this case might well be held to involve the immunity of even its incidental private business from state taxation. It would be unsafe, however, to conclude that a state's immunity from federal taxation would necessarily include the incidental non-governmental activities of a state owned instrumentality primarily engaged in performing strictly governmental functions, or that all of the activities of a state owned instrumentality, and the instrumentality itself, will be deemed governmental if its primary purposes and activities are such. There is less than a reasonable probability that this position will ultimately be reached.

The federal government has frequently employed agencies that were primarily and predominantly private profit enterprises. Its power to do so is unquestionable. It has frequently conferred upon them a specifically defined immunity from state taxation, and has at other times restricted the manner in which, and the extent to which, the states were permitted to tax them.¹⁴ Agencies of this character are impliedly immune only to the extent that state taxation would unduly hamper or destroy their performance of the federal functions that they were created to perform.¹⁵ A Congressional grant of immunity no more extensive than that would be valid but not absolutely necessary. The validity of a more extensive legislatively conferred immunity has not yet been authoritatively determined. The statutory immunity of national banks from every form of state taxation other

¹² *Van Brocklin v. Tennessee*, 117 U.S. 151, 6 S.Ct. 670, 29 L.Ed. 845; *State of Alabama v. United States*, Ct.Cl., 38 F.2d 897, reversed on other grounds, 282 U.S. 502, 51 S.Ct. 225, 75 L.Ed. 492.

¹³ *New York ex rel. Rogers v.*

Graves, 299 U.S. 401, 57 S.Ct. 265, 81 L.Ed. 306.

¹⁴ That it may validly do so, see *Van Allen v. Assessors*, 3 Wall. 573, 18 L.Ed. 229.

¹⁵ See statement in *Indian Motorcycle Co. v. United States*, 283 U.S. 570, 51 S.Ct. 601, 75 L.Ed. 1277.

than that assented to by Congress is now based on the dubious theory that they would be completely immune from state taxation but for such assent.¹⁶ This is predicated on a conception of the scope of the implied immunity more extensive than can be justified by other decisions. The cases discussing it can thus furnish no guide to the issue last stated. A state tax on mortgages executed to federal land banks has been held invalid for conflict with a Congressional grant of immunity,¹⁷ and the grant of a like immunity to the bonds issued by such banks, and the income therefrom, has been sustained on the theory that state taxation thereof might hamper or destroy the banks' exercise of the authority Congress had conferred upon them.¹⁸ The specific federal governmental functions which these banks were created to exercise did not include their lending powers. That power to lend was the basis of their power to engage in private business operations through which the primary objective of their creation would be realized, but in exercising it they were not exercising functions of the federal government unless every person upon whom federal legislation confers rights, powers or privileges whose exercise will promote the realization of objectives and purposes within the compass of valid federal action are to be deemed federal instrumentalities. The hampering effect of state taxation of the mortgages executed to, and the bonds issued by, the land banks upon their performance of the specific federal governmental functions for which they were established would be so indirect that such taxation would not be prohibited under the principle of implied immunity of the federal government and its instrumentalities from state taxation. The effect of those taxes upon the realization of the general purposes for which their lending powers were conferred upon such banks was direct. The implied immunity does not, however, prohibit a state from taxing the property of a private agency of the federal government even where that property is that which would be utilized in performing the federal governmental functions which such agency was created to perform,¹⁹ nor does it prohibit the state from taxing private rights and privileges created by Congress to promote an objective within the scope of federal

¹⁶ *Owensboro Nat. Bank v. Owensboro*, 173 U.S. 684, 19 S.Ct. 537, 43 L.Ed. 850.

¹⁷ *Federal Land Bank v. Crosland*, 261 U.S. 374, 43 S.Ct. 385, 67 L.Ed. 703, 29 A.L.R. 1.

¹⁸ *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 41 S.Ct. 243, 65 L.Ed. 577.

¹⁹ *Union Pac. R. Co. v. Peniston*, 18 Wall. 5, 21 L.Ed. 787.

powers.²⁰ The private profit phase of such instrumentalities and their use removes them from the scope of the implied immunity even though their relation to the ultimate objectives of the exertion of a federal power should be held determinative of their status, and that of their activities, as federal instrumentalities. The state tax on the mortgages executed to, and the bonds issued by, the land banks would not have been invalid under the principles of implied immunity under the theory of the cases last considered. The conclusion is justified that Congress may confer upon the federal instrumentalities that it selects or creates an immunity from state taxation more extensive than that which they would have under the implied immunity principle. Its action in this respect is valid if the grant of such immunity is a necessary and proper means for carrying out the federal functions for which those agencies were selected or established. There is no certain indication whether this would include power to protect every federally created right, power and privilege from state taxation merely because their creation was a valid means for realizing an objective that the federal government is permitted to promote. The need for protecting the taxing power of the government imposing the tax against undue impairment by extending the scope of the implied immunity beyond that indicated by the principle on which it rests has become a factor of increasing importance in determining its scope,²¹ and might well assume an equal importance in defining the limits of Congress' power to confer immunity from state taxation upon federal agencies that are primarily and predominantly private in character and purpose. The states seem to be without power to confer upon their agencies, whether or not public or private in character, any immunity beyond that accorded them under the principle of their implied immunity from federal taxation.

A principal factor invoked in first establishing the implied immunity of a federal agency from state taxation was the fear that to grant the existence of a power to tax at all would involve the recognition of a power in the states to destroy the federal government. This reasoning, and that found in many cases discussing the scope of the principle protecting each govern-

²⁰ *Fox Film Corp. v. Doyal*, 286 U.S. 123, 52 S.Ct. 546, 76 L.Ed. 1010. Cf. *State of California v. Cent. Pac. R. Co.*, 127 U.S. 1, 8 S.Ct. 1073, 32 L.Ed. 150; see *Central Pac. R. Co.*

v. People of California, 162 U.S. 91, 16 S.Ct. 766, 40 L.Ed. 903.

²¹ *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 46 S.Ct. 172, 70 L.Ed. 384.

ment against exercises of the taxing power of the other, proceed on the assumption that each lacks the constitutional power to so exert its taxing power. It has, however, been decided in one case that the assent of Congress validated a state tax on the property of the Reconstruction Finance Corporation all of whose stock was owned by the United States.²² The Corporation was assumed to be a federal instrumentality for the rehabilitation of financial institutions. It was stated that state taxation might overpass the usual limits if Congress had removed or lowered the barriers thereto. The tax was clearly one which the state would not have been permitted to impose without such assent. The result is most readily explained if the scope of the constitutionally established immunity of federal instrumentalities from state taxation be defined as an immunity therefrom without the consent of Congress. This is a wholly different principle from that announced in *McCulloch v. Maryland*, but decisions in other fields make it improbable that it will be extended to permit Congress unlimited discretion in giving its consent. It has also been stated that the states may similarly define the extent of their implied immunity from federal taxation by giving their consent to such taxation.²³ It should be noted that the trend of recent decisions is clearly in the direction of limiting the scope of the implied immunity of a state and its agencies and instrumentalities from federal taxation, and probably also in that of limiting the implied immunity of the federal government, its agencies and instrumentalities from state taxation. The most important factors responsible therefor are the expansion of governmental functions and the desire to prevent the immunity doctrine from unduly restricting the tax sources of the federal and state governments. It represents rather a shift in emphasis than an injection of a wholly new principle.²⁴

²² *Baltimore Nat. Bank v. State Tax Commission of Maryland*, 297 U. S. 209, 56 S.Ct. 417, 80 L.Ed. 586.

²³ See dissenting opinion of Cardozo, J., in *Ashton v. Cameron County Water Imp. Dist. No. 1*, 298 U.S. 513, 56 S.Ct. 892, 80 L.Ed. 1309, and opinion of Hughes, Ch.J., in *UNITED STATES v. BEKINS*, 304 U.S. 27, 58 S.Ct. 811, 82 L.Ed. 1137, *Black's Cas. Constitutional Law*, 2d 116.

²⁴ SEE *JAMES v. DRAVO CON-*

TRACTING CO., 302 U.S. 134, 58 S. Ct. 208, 82 L.Ed. 155, 114 A.L.R. 318, *Black's Cas. Constitutional Law*, 2d 91; *Helvering v. Mountain Producers Corp.*, 303 U.S. 376, 58 S.Ct. 623, 82 L.Ed. 907; *Allen v. Regents of University System of Georgia*, 304 U.S. 439, 58 S.Ct. 980, 82 L.Ed. 1448; *HELVERING v. GERHARDT*, 304 U.S. 405, 58 S.Ct. 969, 82 L.Ed. 1427, *Black's Cas. Constitutional Law*, 2d 105.

STATE AND FEDERAL INTERACTIONS—OTHER POWERS

83. Each government is also immune from undue interference with its activities through the other's exercise of its powers other than its taxing power, but the extent of a state's immunity hereunder is less than that of the national government because of the principle of federal supremacy.
84. A state may not interfere with the enforcement of federal laws within its territory.
85. Neither government can impose upon the officers of the other the duty of enforcing its laws, but each may consent to having its officers do so.
86. The Constitution does not prohibit every form of co-operative effort between the national and state governments.

The federal government and its instrumentalities are also immune from interference by the states in their exercise of other than their taxing powers. State statutes requiring the publication at the holder's expense of receipts evidencing the payment of federal license taxes on the sale of intoxicating liquors,²⁵ and those conditioning the validity of a federal tax lien on real estate upon its recording under state law,²⁶ have been held invalid interferences with the federal taxing power. A state law regulating the use of oleomargarine cannot be applied to a soldiers' home even though that was not located on land over which the state had ceded jurisdiction to the United States.²⁷ The federal government may perform its functions without conforming to a state's police regulations,²⁸ although general rules of conduct prescribed by a state incidentally or remotely affecting the performance of their duties by employees of the federal government, such as reasonable traffic regulations, may be applied to them at least under ordinary circumstances.²⁹ A state may not, however, condition the right of a postal employee to operate a truck over its highways on his procuring a state license since that would involve permitting the state to impose

²⁵ *State of North Dakota ex rel. Flaherty v. Hanson*, 215 U.S. 515, 30 S.Ct. 179, 54 L.Ed. 307.

²⁶ *United States v. Snyder*, 149 U.S. 210, 13 S.Ct. 846, 37 L.Ed. 705.

²⁷ *State of Ohio v. Thomas*, 173 U.S. 276, 19 S.Ct. 453, 43 L.Ed. 699.

²⁸ *State of Arizona v. California*, 283 U.S. 423, 51 S.Ct. 522, 75 L.Ed. 1154.

²⁹ *Comm. v. Closson*, 229 Mass. 329, 118 N.E. 653, L.R.A.1918C, 939.

qualifications for federal employment additional to those deemed sufficient by the latter government.³⁰ It is not required to furnish specific services to the federal government free, but it is a question of federal constitutional law whether such charge is a payment for a service or a disguised attempt to tax a federal function.³¹ It has recently been held that a committee of a state legislature may not investigate the activities of a federal agency operating within the state.³² This position is defensible so far as the committee was attempting to compel the attendance of persons connected with the agency in any manner, and the production and examination of its records, but is extreme so far as it completely denied the power of investigation on the assumption that merely making it constituted an interference with the federal agency's performance of its functions. These restrictions on a state's power prevent it from so regulating or controlling even the private activities of a federal agency, that is primarily a private profit enterprise, as would unduly hamper the carrying out of the federal function for which it was created, and in this field Congress has wide powers of defining the extent of such agency's immunity from state regulation of its affairs.³³ The states and their agencies are also immune from certain forms of federal control and regulation, but their immunity is not as extensive as that of the federal government from state control. It has been stated that the federal government may not exercise its monetary powers so as to prevent a state from determining in what medium its taxes shall be payable,³⁴ and it has been decided that the federal bankruptcy power may not be exerted to permit municipal corporations of a state to resort to federal courts to readjust their debts even with the consent of the state.³⁵ The basis for the latter holding was the interference with the freedom of the state to manage its own affairs that such federal action was assumed to involve. It has recently been in effect over-ruled.³⁶

³⁰ *Johnson v. Maryland*, 254 U.S. 51, 41 S.Ct. 16, 65 L.Ed. 126.

³¹ *Federal Land Bank v. Crosland*, 261 U.S. 374, 43 S.Ct. 385, 67 L.Ed. 703, 29 A.L.R. 1.

³² *United States v. Owlett, D.C.*, 15 F.Supp. 736.

³³ *First Nat. Bank of San Jose v. California*, 262 U.S. 366, 43 S.Ct. 602, 67 L.Ed. 1030; *Easton v. Iowa*, 188

U.S. 220, 23 S.Ct. 288, 47 L.Ed. 452; *Missouri ex rel. Burnes Nat. Bank v. Duncan*, 265 U.S. 17, 44 S.Ct. 427, 68 L.Ed. 881.

³⁴ *Lane County v. Oregon*, 7 Wall. 71, 19 L.Ed. 101.

³⁵ *Ashton v. Cameron County Water Improvement Dist. No. 1*, 298 U.S. 513, 56 S.Ct. 892, 80 L.Ed. 1309.

³⁶ *UNITED STATES v. BEKINS*,

The national government may not exercise its concurrent powers to confer upon the private instrumentalities, created by a state to realize policies it is authorized to promote, powers whose exercise would result in defeating those objectives, even where those instrumentalities were in no sense direct governmental agencies.³⁷ There are, however, certain federal powers to whose exercise by Congress every state function may be validly subjected. The power to regulate foreign commerce, and that of regulating interstate commerce in at least some of its phases, have been held such in this connection. This is the basis for denying a state university immunity from the payment of import duties on equipment imported for use in the performance of its educational functions,³⁸ and for denying freedom from the provisions of the Federal Safety Appliance Act to a state owned railroad engaged in interstate commerce.³⁹ It is immaterial in this connection that the regulated activities are carried on by the state in its governmental as distinct from its non-governmental capacity. The inequality of the two governments in this field is also illustrated by the decisions that deny the state the power to grant the power to condemn federal lands within it,⁴⁰ but permit the federal government to condemn even public streets of a municipality of the state.⁴¹ It is undetermined how far the national government would be permitted to condemn property used by the state or its political subdivisions in their performance of their functions, and whether any distinction will be made in that connection between such property used for governmental and that used for non-governmental purposes. These conflicts between the two governments have been adjusted in at least some instances by balancing the interest of the one that would be promoted by applying its regulations to the other against those of the latter that would be se-

304 U.S. 27, 58 S.Ct. 811, 82 L.Ed. 1137, Black's Cas. Constitutional Law, 2d 116.

³⁷ HOPKINS FEDERAL SAVINGS & LOAN ASS'N v. CLEARY, 296 U.S. 315, 56 S.Ct. 235, 80 L.Ed. 251, 100 A.L.R. 1403, Black's Cas. Constitutional Law, 2d 85.

³⁸ Board of Trustees of University of Illinois v. United States, 289 U.S. 48, 53 S.Ct. 509, 77 L.Ed. 1025.

³⁹ UNITED STATES v. PEOPLE

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OF STATE OF CALIFORNIA, 297 U.S. 175, 56 S.Ct. 421, 80 L.Ed. 567, Black's Cas. Constitutional Law, 2d 82.

⁴⁰ Utah Power & Light Co. v. United States, 243 U.S. 389, 37 S.Ct. 387, 61 L.Ed. 791.

⁴¹ See Town of Nahant v. United States, 1 Cir., 136 F. 273, 69 L.R.A. 723, in which this power was assumed.

cured through conferring upon it immunity from such regulation.

The federal government is inevitably compelled to enforce its laws within the territorial limits of the states. The states may not interfere with its officers in their performance of their duties, nor are they permitted to punish those officers for acts within their authority which, but for that, would constitute violations of state law.⁴² This does not mean that the states are necessarily prohibited from trying the issues involved in such cases in their own courts, but federal courts have in some of these cases prevented state courts from so doing and decided the issues themselves either by removing the cases to the federal court or in habeas corpus proceedings brought to test the legality of a state's detention of such federal officer.⁴³ A statute providing for the removal to a federal court of prosecutions of federal officers where the basis of the prosecution was an act done under authority, or claim of authority, of the federal government has been held valid as providing an effective means for carrying out the executive and administrative powers conferred upon it by the Constitution.⁴⁴ The two methods referred to above constitute important devices for maintaining federal supremacy within the field of the constitutionally prescribed powers of the national government.

The Constitution does not prohibit cooperative action between the national and state governments. Neither can impose upon the officers, employees and departments of the other any duty to enforce its own laws.⁴⁵ This probably does not include the imposition upon state officers and employees of duties involving matters with respect to which the states are liable to federal regulation. There is, however, no provision in the federal Constitution preventing either government from permitting its agents to act on behalf of the other, and the national government has frequently availed itself of the services of state officials and departments of government in carrying out its own governmental powers.⁴⁶ A state may not take a federal pris-

⁴² Tarble's Case, 13 Wall. 397, 20 L.Ed. 597; Ableman v. Booth, 21 How. 506, 16 L.Ed. 169; Tennessee v. Davis, 100 U.S. 257, 25 L.Ed. 648.

⁴³ Tennessee v. Davis, *supra*, footnote 42; In re Neagle, 135 U.S. 1, 10 S.Ct. 658, 34 L.Ed. 55.

⁴⁴ Tennessee v. Davis, *supra*, footnote 42.

⁴⁵ Kentucky v. Dennison, 24 How. 68, 16 L.Ed. 717.

⁴⁶ See Prigg v. Pennsylvania, 16 Pet. 539, 10 L.Ed. 1060; Robertson

oner from the custody of federal officers, but the national government may voluntarily surrender such prisoner to the state for prosecution and punishment.⁴⁷ State courts, otherwise competent, may not decline jurisdiction because the rights involved arise under federal law, but the mere grant of concurrent jurisdiction upon state courts in such cases does not make them competent to entertain such cases since the state alone can determine the character of case within the jurisdiction of its own courts.⁴⁸

FEDERAL COURTS AND STATE LAW

87. The judicial department of each government has the power of final decision on matters within the field of such government's supremacy.
88. The state courts are required to follow the adjudications of federal courts on matters of federal law.
89. The federal courts generally follow the settled adjudications of the proper state courts on matters of state law, constitutional, statutory, and common.
90. The rule of the preceding paragraph was once held subject to several well recognized exceptions. The federal courts do not follow state decisions if the effect would be to defeat rights acquired in reliance upon earlier state decisions. They formerly refused to follow state decisions on what constitutes the state's common law where the matter is one of general law not involving rules of property or local usages, but this position has recently been reversed and abandoned.
91. The action of the federal courts in these matters was predicated on the dubious theory that following state decisions is a matter of comity rather than of constitutional requirement.

The jurisdiction of federal and state courts is in many cases concurrent. The avoidance of conflicts within this area is se-

v. Baldwin, 165 U.S. 275, 17 S.Ct. 326, 41 L.Ed. 715; and Holmgren v. United States, 217 U.S. 509, 30 S.Ct. 588, 54 L.Ed. 861, 19 Ann.Cas. 778. These cases discuss various situations involving federal use of state officials.

⁴⁷ Grant v. Guernsey, 10 Cir., 63 F. 2d 163; Chapman v. Scott, D.C., 10 F.2d 156; Ponzi v. Fessenden, 258 U.

S. 254, 42 S.Ct. 309, 66 L.Ed. 607, 22 A.L.R. 879.

⁴⁸ Second Employers' Liability Cases, 223 U.S. 1, 32 S.Ct. 169, 56 L.Ed. 327, 38 L.R.A.,N.S., 44. McKnett v. St. Louis & S. F. R. Co., 292 U.S. 230, 54 S.Ct. 690, 78 L.Ed. 1227. See also Douglas v. New York, N. H. & H. Ry. Co., 279 U.S. 377, 49 S. Ct. 355, 73 L.Ed. 747.

cured in part through the recognition by the courts of each government of the principle of comity under which the court first obtaining jurisdiction over a person or thing is permitted to retain it for the purposes of the case in which it obtained it. This method is necessarily unavailable where Congress has conferred upon litigants a right to remove a case from a state to a federal court but even here has the principle of comity been used to prevent the fraudulent exercise of such right.⁴⁹ The federal statute that prohibits federal courts from issuing injunctions to stay proceedings in state courts except in connection with bankruptcy proceedings constitutes a legislative recognition of the comity principle. The statute has not, however, prevented such injunctions where necessary to protect the jurisdiction or judgments of federal courts.⁵⁰ The inability of state courts to interfere with proceedings in federal courts is a corollary from the principle of federal supremacy so far as those proceedings are within the constitutional competence of federal courts, and can be justified on that basis even in other instances on the theory that the correction of any erroneous assertion of jurisdiction by inferior federal courts will have to be by review by superior federal courts in order to insure the complete independence of that system from state control.

The constitutionally established division of powers between the national and state governments implies the power in the judicial department of each to make the final decision on matters lying within the field in which each is respectively supreme.⁵¹ The rule is well established that the decisions of the federal Supreme Court on issues of federal constitutional and statute law are binding on state courts, and the same force should be accorded the decisions of other federal courts. It is also the general rule that federal courts will follow the decisions of a state's highest court on matters of its constitutional and statute law, and it is sometimes correctly stated that it is their duty so to do.⁵² There is a well recognized exception where to follow a state court's decision reversing a prior decision by it would defeat rights acquired in reliance upon the earlier deci-

⁴⁹ *Harkin v. Brundage*, 276 U.S. 36, 48 S.Ct. 268, 72 L.Ed. 457.

⁵¹ *Elmendorf v. Taylor*, 10 Wheat. 152, 6 L.Ed. 289.

⁵⁰ *Kern v. Huidekoper*, 103 U.S. 485, 26 L.Ed. 354; *Simon v. Southern Ry. Co.*, 236 U.S. 115, 35 S.Ct. 255, 59 L.Ed. 492.

⁵² *Georgia Ry. & Power Co. v. Decatur*, 262 U.S. 432, 43 S.Ct. 613, 67 L.Ed. 1065.

sion.⁵³ There have also been instances in which the federal Supreme Court has refused to follow a rule established by a single state decision rendered after the rights involved in the case in the federal court had accrued.⁵⁴ A large part of the field whose regulation lies within the exclusive legislative competence of a state is governed by the common or other judicially formulated law. Federal courts are frequently required to decide what is the common law of a state, particularly in exercising their jurisdiction based on diversity of citizenship. They have almost invariably followed existing state decisions on its common law where the matter involved rules of property law or ancient or fixed local usages, and have generally done so even where other fields of the common law were involved.⁵⁵ They, however, for a long time consistently refused to do so where the matter was one of general law, although in its inception in *Swift v. Tyson* this position was affirmed for matters of general commercial law only.⁵⁶ The theory on which this position was based was that the common law is a single unitary body of law prevailing wherever the common law is recognized, that the effort of both state and federal courts is to discover the applicable rule, and that the latter need accept the former's decision only if they believe the state courts have correctly ascertained the rule.⁵⁷ This position implied that in following state decisions on the common law involving property and matters of peculiarly local interest federal courts were acting on the principles of comity and not under compulsion of constitutional requirement. It has been forcefully criticized in a dissenting opinion by Mr. Justice Holmes as based on the fallacious assumption that the rules of the com-

⁵³ *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L.Ed. 520.

⁵⁴ *Stanly County v. Coler & Co.*, 190 U.S. 437, 23 S.Ct. 811, 47 L.Ed. 1126.

⁵⁵ *Green v. Neal*, 6 Pet. 291, 8 L. Ed. 402; *Bucher v. Cheshire Ry. Co.*, 125 U.S. 555, 8 S.Ct. 974, 31 L.Ed. 795; *Edward Hines Yellow Pine Trustees v. Martin*, 268 U.S. 458, 45 S.Ct. 543, 69 L.Ed. 1050. For a case in which federal court refused to follow state decisions in these fields, see *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 80 S.Ct. 140, 54 L.Ed. 228.

⁵⁶ *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865; *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 48 S.Ct. 404, 72 L.Ed. 681, 57 A.L.R. 426; *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L.Ed. 627; *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495, 10 L.Ed. 1044; *Hewlett v. Schadel*, 4 Cir., 68 F.2d 502, 91 A.L.R. 743.

⁵⁷ *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, *supra* footnote 56.

mon law have legal force within a state apart from the action of the state giving them such force.⁵⁸ That dissenting opinion took the position that the practices of the federal courts in refusing to be bound by state decisions in this field involved an invasion of the state's power to determine its own law on a matter within its exclusive sphere through organs of its own selection. The federal courts would be bound by the state rule in this field if the state gave the rule the form of statute law.⁵⁹ It was difficult to reconcile the prevailing views with the theory of our federal system unless it were assumed that the constitutional grant of federal judicial power included that of deciding matters of state law independently of the action of the state's judicial department thereon. The views of that dissenting opinion have now become law.⁶⁰ The theory now accepted does not meet the situations when there are no authoritative state decisions on such matters, or when those decisions are in conflict. Federal courts have perforce to reach independent decisions thereon under such circumstances, and this is equally true where the matter is one of construing the constitution and statutes of a state.

THE POSITION OF THE STATES IN THE UNION

92. The United States may sue the states without their consent in the United States Supreme Court, but suits by a state against the United States require consent of the latter.
93. The Congress may impose conditions upon the admission of new states, but these do not bind the state after its admission if their effect would be to destroy its political equality as a member of the Union.
94. The United States guarantees every state a republican form of government, but the question of whether a state's government is such is a political one.
95. The Constitution imposes numerous limitations upon the states which are enforced against it through judicial action, including federal judicial action. The federal government possesses to that extent a limited supervisory power over the state and its activities.

⁵⁸ Dissenting opinion of Holmes, J., in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, supra, footnote 56.

U.S. 487, 54 S.Ct. 813, 78 L.Ed. 1380, 92 A.L.R. 1193.

⁶⁰ *ERIE R. CO. v. TOMPKINS*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487, *Black's Cas. Constitutional Law*, 2d 121.

⁵⁹ *Burns Mortg. Co. v. Fried*, 292

The federal Constitution contains no specific provisions as to how far, if at all, the United States and the states may invoke the aid of their respective judicial departments in the settlement of such controversies as may arise between them. The United States is immune from suit, even by a state, without its consent.⁶¹ The states, however, may be sued by the United States without their consent, and suits of this character are within the original jurisdiction of the Supreme Court.⁶² It has never yet been determined whether Congress could validly confer jurisdiction over such suits upon an inferior federal court.

The Constitution contemplates an indestructible Union composed of indestructible states that are to be equal in power, dignity and authority.⁶³ The power to admit new states is vested in Congress, but no new state may be formed within the jurisdiction of any other state, and no state may be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of Congress.⁶⁴ Congress may impose conditions on whose fulfillment admission depends.⁶⁵ There is no indication that its power is in any way limited in this respect since there is no right on the part of the people of any given territorial area to admission as an organized state. A state conditionally admitted is not bound after its admission by any conditions whose observance would place it in a political position in the Union inferior to that occupied by the other states. It may, accordingly, free itself therefrom at any time after its admission.⁶⁶ It cannot, however, by its own act repudiate any conditions imposed upon it when admitted if they involve restrictions on its powers that might be imposed by federal legislation after its admission, such as those affecting its control over federal lands within it.⁶⁷ The Constitution in general permits each state to determine the form of its own government, although it imposes on the United States

⁶¹ *State of Kansas v. United States*, 204 U.S. 331, 27 S.Ct. 388, 51 L.Ed. 510.

⁶² *United States v. Texas*, 143 U.S. 621, 12 S.Ct. 488, 36 L.Ed. 285.

⁶³ *Texas v. White*, 7 Wall. 700, 19 L.Ed. 227; *COYLE v. SMITH*, 221 U.S. 559, 31 S.Ct. 688, 55 L.Ed. 853, *Black's Cas. Constitutional Law*, 2d 127.

⁶⁴ U.S.C.A.Const., Art. IV, Sec. 3.

⁶⁵ *Permoli v. Municipality No. 1 of New Orleans*, 3 How. 589, 11 L.Ed. 739.

⁶⁶ *COYLE v. SMITH*, *supra*, footnote 63.

⁶⁷ *Stearns v. Minnesota*, 179 U.S. 223, 21 S.Ct. 73, 45 L.Ed. 162; *Economy Light & Power Co. v. United States*, 256 U.S. 113, 41 S.Ct. 409, 65 L.Ed. 847.

the duty of guaranteeing to every state a republican form of government.⁶⁸ The federal courts have consistently declined to assume the burden of effectuating this guarantee, putting their refusal on the basis that the question of what constitutes a republican form of government is a political one.⁶⁹ The guarantee must be executed through the other departments of the federal government. The Constitution, as has been shown, does limit the scope of governmental power exercisable by a state. Some of these limitations are intended to prevent encroachment on the field of federal powers,⁷⁰ and others are aimed at protecting certain individual interests against state action.⁷¹ The issue of whether a state has transgressed any of these restrictions on its powers involves a federal constitutional question, and, so far as it can be given a justiciable form, is a matter within the scope of federal judicial power. The final decision on these aspects of the position of the states in our federal system may thus rest with federal courts, and does so to the extent that their actual jurisdiction includes cases of this character. The federal government thus has a limited control over the form of state governments, and an extensive control over their exercise of their powers to prevent violations of the limitations imposed thereon by the federal Constitution.

⁶⁸ U.S.C.A.Const., Art. IV, Sec. 4.

contains the more important limitations of this character.

⁶⁹ *Luther v. Borden*, 7 How. 1, 12 L.Ed. 581; *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118, 32 S.Ct. 224, 56 L.Ed. 377.

⁷¹ The most important single provision of this character is U.S.C.A. Const., Amend. 14, Sec. 1.

⁷⁰ U.S.C.A.Const., Art. I, Sec. 10,

CHAPTER 5

INTERSTATE RELATIONS

- 96. General Principles.
- 97-99. Interstate Privileges and Immunities.
- 100. Full Faith and Credit Clause.
- 101-103. Interstate Extradition.
- 104. Compacts between the States.
- 105. Suits between the States.

GENERAL PRINCIPLES

96. The Constitution has imposed important limitations on the states for the purpose of promoting peaceable relations among them and eliminating obstacles to the realization of an effective union among them. In matters not so regulated the several states occupy the position of independent powers whose relations are governed by the principles of private international law.

The relations that exist between the separate states of the Union differ materially from those existing between independent nations. They have retained a considerable degree of independence of each other, and the due process clause of the fourteenth amendment has been an important factor therein so far as it has invalidated efforts of one state to give its laws extra-territorial effect.¹ The power of each state to regulate its own internal affairs without interference from another state is well established, but this does not mean that it is wholly free to ignore what other states have done in their regulation of their internal affairs. This is one respect in which the relations between the states differ from those between nations. The bases for such differences include certain express provisions of the federal Constitution. These are the interstate privileges and immunities clause,² the full faith and credit clause,³ the interstate rendition clause,⁴ the interstate compact provision,⁵ and

¹ *Allgeyer v. Louisiana*, 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832.

⁴ U.S.C.A.Const., Art. 4, Sec. 2, Cl. 2.

² U.S.C.A.Const., Art. 4, Sec. 2, Cl. 1.

⁵ U.S.C.A.Const., Art. 1, Sec. 10, Cl. 3.

³ U.S.C.A.Const., Art. 4, Sec. 1.

that including controversies between two or more states within the judicial power of the United States.⁶ The specific major objective of each of these will be subsequently considered. Their combined effect has been to qualify the extent to which the several states are permitted to exercise the powers reserved to them under the Constitution for the ultimate general purpose of promoting peaceable relations among them and eliminating many of the obstacles to the realization of an effective union among them. The courts have developed no such implied limits on the exercise of state powers for the protection of one state from another as those that protect the states and the federal government from action by each other. Thus a state may tax the bonds issued by another state that are within the former's jurisdiction as determined by principles derived from the due process clause of the fourteenth amendment.⁷ Such provisions as the interstate privileges and immunities and the full faith and credit clauses define what one state is required to do in respect of the matters with which those clauses deal, but do not prohibit it from adopting a more favorable policy in dealing therewith as a matter of interstate comity. Thus the latter of these clauses does not require the courts of one state to recognize a judgment for a penalty obtained in the courts of another state,⁸ but it does not prevent the former from adopting a policy of permitting its courts to do so. There are also many other matters involving issues of interstate law that lie outside the range of the specific constitutional provisions dealing with interstate relations with respect to which each state is free to adopt its own policy unfettered by limitations resulting from those provisions. Some of these are generally governed by the rules of the conflict of laws prevailing within the several states. The limits on the powers of a state in dealing with the interests of the citizens of other states, and with the rights acquired and obligations imposed under the laws or proceedings of other states, are only in part based on the federal constitutional provisions referred to above, but the present chapter will consider only those limitations that are based thereon.

⁶ U.S.C.A.Const., Art. 3, Sec. 2.

⁸ *Wisconsin v. Pelican Ins. Co.*, 127

⁷ *Bonaparte v. Appeal Tax Court*,

U.S. 265, 8 S.Ct. 1370, 32 L.Ed. 239.

104 U.S. 592, 26 L.Ed. 845.

INTERSTATE PRIVILEGES AND IMMUNITIES

97. The Constitution specifically provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."
98. The dominant purpose of this provision is to prevent a state from subjecting the citizens of other states to the disabilities of alienage while within, or with respect to their interests within, the former state.
99. It does not require a state to treat the citizens of other states in all respects in the same manner as it does its own citizens, but does require it not to discriminate against them in respect of certain fundamental rights and privileges.

The interstate privileges and immunities clause of the Constitution specifically provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."⁹ The primary purpose of this provision was to prevent a state from subjecting the citizens of other states to the disabilities of alienage by guaranteeing to them so far as they or their interests were within the jurisdiction of the former state, the privileges and immunities conferred by it upon its own citizens.¹⁰ It affords a citizen no protection whatever against action by his own state. Its provisions are not violated by the refusal of a state's courts to admit women who are citizens of the state to practise law before them.¹¹ It does not require a state to accord its own citizens the same privileges and immunities conferred upon their own citizens by other states. It has, accordingly, been held that a state does not violate this clause by denying bail to its citizens accused of crime merely because the laws of most of the other states allowed their own citizens to give bail in such situations.¹² Nor does it enable the citizen of one state to demand in another the special privileges granted by his own state to its citizens.¹³ A state is not required by this provision to permit the citizen of one state to practise law within it merely because he has been granted that privilege by the state of which he is a citizen.¹⁴ The laws of one state are

⁹ U.S.C.A.Const., Art. 4, Sec. 2, Cl. 1.

¹⁰ Paul v. Virginia, 8 Wall. 168, 19 L.Ed. 357.

¹¹ Bradwell v. Illinois, 16 Wall. 130, 21 L.Ed. 442.

¹² McKane v. Durston, 153 U.S. 684, 14 S.Ct. 913, 38 L.Ed. 867.

¹³ Paul v. Virginia, 8 Wall. 168, 19 L.Ed. 357.

¹⁴ In re Rodgers' Petition, 194 Pa. 161, 46 A. 668.

not given extra-territorial effect by this clause.¹⁵ It is, furthermore, aimed only at action by the state or its governmental agencies, and not at action by private persons.¹⁶ It differs, insofar as it fails to protect a citizen against action by his own state, from that provision of the Fourteenth Amendment to the federal Constitution which prohibits a state from making or enforcing any law abridging the privileges or immunities of citizens of the United States. That may be invoked by a citizen against his own state if it attempts by law to abridge the privileges or immunities of federal citizenship.¹⁷

The interstate privileges and immunities clause limits a state only in its treatment of citizens of other states, and measures the privileges and immunities which it is required to extend to them by those that it accords its own citizens.¹⁸ It does not prohibit discriminations against aliens in favor of a state's own citizens.¹⁹ A corporation is not a citizen within its provisions.²⁰ The courts have consistently refused to look beyond the corporate entity to the individual shareholders in order to extend the protection of this clause to foreign corporations.²¹ A business trust which is treated as an entity similar to a corporation by the state under whose laws it exists may be treated as such by any other state, and may not invoke this clause against any such state when it subjects the trust's privilege to conduct a local business therein to the same restrictions imposed on foreign corporations.²² The decisive factor in determining whether an organization may be treated as a corporation that is excluded from the benefits of this constitutional provision is not what it is called, but the extent to which it is clothed with the usual powers, privileges and other attributes of corporations by the law

¹⁵ *Paul v. Virginia*, 8 Wall. 163, 17 L.Ed. 357.

¹⁶ *United States v. Wheeler*, 254 U.S. 281, 41 S.Ct. 133, 65 L.Ed. 270.

¹⁷ *Colgate v. Harvey*, 296 U.S. 404, 56 S.Ct. 252, 80 L.Ed. 299, 102 A.L.R. 54.

¹⁸ *Paul v. Virginia*, 8 Wall. 163, 19 L.Ed. 357.

¹⁹ *In re Johnson's Estate*, 139 Cal. 532, 73 P. 424, 96 Am.St.Rep. 161.

²⁰ *Paul v. Virginia*, 8 Wall. 163, 19

L.Ed. 357; *Blake v. McClung*, 172 U.S. 239, 19 S.Ct. 165, 43 L.Ed. 432.

²¹ The federal Supreme Court has refused to employ the reasoning by which it finally held corporations to be "citizens" within the Judiciary Article of the Constitution in defining the same term as used in the interstate privileges and immunities clause. See cases cited in footnote 20, *supra*.

²² *Hemphill v. Orloff*, 277 U.S. 537, 48 S.Ct. 577, 72 L.Ed. 978.

under which it exists.²³ A state need not, moreover, treat even the citizens of other states in all respects in precisely the same manner that it does its own. Its power to differentiate between them is due in part to the fact that not every advantageous legal relation created by a state's action is deemed a privilege or immunity of citizens within this provision, and in part to the fact that exact equality is not required even with respect to those that are deemed such. The earlier cases were more concerned with defining the privileges and immunities protected by this provision, while the later decisions have dealt more with the general tests for determining the validity or invalidity of given differences in a state's treatment of its own citizens and those of other states. Some cases have involved state action affirmatively conferring advantages on its own citizens exclusively; some, state action discriminating in favor of its own citizens in conferring advantages not wholly denied citizens of other states; some, state action affirmatively imposing burdens on all but its own citizens; and some, state action discriminating against all but its own citizens in imposing burdens from which its own citizens were not wholly relieved. Whatever the specific form which the differences have assumed, the courts have tended to test their validity by whether the differences in treatment in favor of a state's own citizens could be justified on any reasonable basis. The fact that the citizen of another state is claiming equality with respect to a privilege or an immunity not protected by this constitutional provision is a decisive factor in justifying a state's discrimination against him, but a discrimination in respect of a privilege or immunity protected by that provision may be justified by showing that it is reasonable.

The courts have consistently refused to fetter their freedom in construing this provision by precise definitions of the phrase "privileges or immunities." They have at various times enumerated some of those included among the protected privileges and immunities. It was stated in a comparatively early case that they included only those which were in their nature fundamental, which belonged of right to the citizens of all free governments, and which had at all times been enjoyed by the citizens of the several states composing the union from the time of their becoming independent.²⁴ The attempt to deduce them from this theoretical basis has been practically abandoned long

²³ *Hemphill v. Orloff*, *supra*.

²⁴ *Corfield v. Coryell*, *Fed.Cas.No.* 3,230.

since, but many of those enumerated in the opinion in that case have been generally accepted as includible among those protected. These include protection by government, the enjoyment of life and liberty with the right to acquire, own and dispose of property subject to such restriction as the general welfare may require, the right to reside in and to pass through a state, access to its courts, and immunity from discriminatory taxation. Subsequent decisions involving these have either expressly held, or impliedly recognized, that they were among the privileges protected by this constitutional provision.²⁵ A state may, however, grant its citizens exclusive rights or advantages in many of their relations with it. There is no privilege more generally dependent on citizenship than that of voting or holding public office, but a state may limit their exercise to its own citizens.²⁶ It may restrict the planting and taking of oysters within its territorial waters to its own citizens,²⁷ and preserve for their use the waters of its streams by prohibiting their diversion to points without the state for use there by citizens of other states.²⁸ These discriminations have been sustained on the theory that a state owns such resources in trust for its citizens, that their interest therein is in the nature of a property right rather than a mere privilege of citizenship, and that the interstate privileges and immunities clause did not invest the citizens of one state with any interest in the common property of the citizens of other states.²⁹ An analogous approach has been used to validate legislation limiting the right to bid on public contracts to residents of the state,³⁰ and requiring all state and municipal building contracts to provide for giving preference to state products in procuring construction materials.³¹ The de-

²⁵ *La Tourette v. McMaster*, 248 U.S. 465, 39 S.Ct. 160, 63 L.Ed. 362; *CANADIAN NORTHERN RY. CO. v. EGGEN*, 252 U.S. 553, 40 S.Ct. 402, 64 L.Ed. 713, *Black's Cas. Constitutional Law*, 2d 140.

²⁶ *BLAKE v. McCLUNG*, 172 U.S. 239, 19 S.Ct. 165, 43 L.Ed. 432 (dictum), *Black's Cas. Constitutional Law*, 2d 132; *People ex rel. Akin v. Loeffler*, 175 Ill. 585, 51 N.E. 785 (dictum).

²⁷ *Corfield v. Coryell*, *Fed.Cas.No.* 3,230; *McCready v. Virginia*, 94 U.S. 391, 24 L.Ed. 248.

²⁸ *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 28 S.Ct. 529, 52 L.Ed. 828, 14 Ann.Cas. 560.

²⁹ *McCready v. Virginia*, 94 U.S. 391, 24 L.Ed. 248.

³⁰ *Ebbeson v. Board of Public Education in Wilmington*, 18 Del.Ch. 37, 156 A. 286; *State v. Senatobia Bank Book & Stationery Co.*, 115 Miss. 254, 76 So. 258, Ann.Cas.1918B, 953.

³¹ *Denver v. Bossie*, 83 Colo. 329, 266 P. 214.

cisions furnish no definite test for determining how far a state may favor its own citizens as owner or entrepreneur in matters in respect of which it could not do so in exercising its sovereign power to regulate matters within it. It is, however, certain that it would not be permitted to do so if it effected an undue impairment of the exercise within it by citizens of other states of the privileges heretofore referred to as included within the protection of this clause of the Constitution.

The interstate privileges and immunities clause does not require a state to recognize the private ownership of property within it. It does, however, prohibit a state from denying the right to acquire, own and dispose of property within it to the citizens of other states if it accords them to its own citizens.³² It may not, accordingly, confine to residents the right to act as trustee of property within it.³³ It may, however, limit to residents the right to act as executors or administrators,³⁴ or as assignees for the benefit of creditors,³⁵ since these are deemed special privileges and official positions. The creation and transfer of interests in property are governed by the law of the state in which the property is situated. That state is not required to permit an interest therein to be created by a contract executed without the state merely because a similar contract executed within it would create such interest. It may, therefore, provide that community property interests in property within it shall arise only if the marriage contract is entered into within it.³⁶ Nor need it attach the same property incidents to the marriage relationship of non-residents that it attaches to that relationship in the case of its own residents. The dower interest of a widow in real property within it may be made to include all such property of which the husband was seised during coverture in the case of a resident widow while that of a non-resident widow is limited to such property of which the husband

³² *Corfield v. Coryell*, Fed.Cas.No. 3,230; *Paul v. Virginia*, 8 Wall. 163, 19 L.Ed. 357.

³³ *Farmers' Loan & Trust Co. v. Chicago & A. Ry. Co.*, C.C., 27 F. 146; *Roby v. Smith*, 131 Ind. 342, 30 N.E. 1093, 15 L.R.A. 792, 31 Am.St. Rep. 439. *Contra*, *In re Mulford*, 217 Ill. 242, 75 N.E. 345, 1 L.R.A.,N.S., 341, 108 Am.St.Rep. 249, 3 Ann.Cas. 986.

³⁴ *In re Barnes' Estate*, 187 Cal. 566, 203 P. 100; *In re Mulford's Estate*, 217 Ill. 242, 75 N.E. 345, 1 L.R.A.,N.S., 341, 108 Am.St.Rep. 249, 3 Ann.Cas. 986.

³⁵ *Duryea v. Muse*, 117 Wis. 399, 94 N.W. 365.

³⁶ *Conner v. Elliot*, 18 How. 591, 15 L.Ed. 497.

was seised at the time of his death.³⁷ The community property interest and dower were held not to be included among the privileges of citizenship, although in the case of *Conner v. Elliot* the court also stressed the fact that the statute therein involved merely discriminated between contracts.

The prevention of discrimination in favor of its own citizens against those of other states in their conduct of business within it was one of the principal objectives of the interstate privileges and immunities clause. The right to engage in business and to pursue the ordinary occupations is one of the privileges of citizenship protected by that clause.³⁸ It is, therefore, generally held that a state may not deny equality of commercial privileges to the citizens of other states.³⁹ A state may not exclude residents only from a license requirement imposed on itinerant vendors of merchandise within it,⁴⁰ and a similar discrimination in favor of a limited group of its own citizens has been held invalid.⁴¹ Nor may it impose a minimum capital requirement or other burdensome conditions upon citizens of other states transacting insurance business within it from which its own citizens are relieved.⁴² A state statute giving resident creditors priority over non-resident creditors, whether or not citizens of other states, in the distribution of the local assets of insolvent debtors has been held invalid because it discriminated against citizens of other states in favor of citizens of the state in exercising their right to do business with such debtors within the state.⁴³ The opinion in this case stated that this clause would not prevent a state from qualifying the rights of non-resident creditors in the local assets by reference to amounts received by them from the debtors' assets in other states. It also recognized a state's right to require foreign insurance companies to estab-

³⁷ *Ferry v. Spokane, P. & Se. R. Co.*, 258 U.S. 314, 42 S.Ct. 358, 66 L. Ed. 635, 20 A.L.R. 1326.

³⁸ *Ward v. Maryland*, 12 Wall. 418, 20 L.Ed. 449.

³⁹ *BLAKE v. McCLUNG*, 172 U.S. 239, 19 S.Ct. 165, 43 L.Ed. 432, *Black's Cas. Constitutional Law*, 2d 132; *Chalker v. Birmingham & N. W. Ry. Co.*, 249 U.S. 522, 39 S.Ct. 366, 63 L.Ed. 748.

⁴⁰ *State v. Cohen*, 133 Me. 293, 177 A. 403.

⁴¹ *Ratta v. Healy*, D.C., 1 F.Supp. 669.

⁴² *State ex rel. Hoadley v. Board of Ins. Comm'rs*, 37 Fla. 564, 20 So. 772, 33 L.R.A. 288; *Barnes v. People ex rel. Moloney*, 168 Ill. 425, 48 N.E. 91.

⁴³ *BLAKE v. McCLUNG*, 172 U.S. 239, 19 S.Ct. 165, 43 L.Ed. 432, *Black's Cas. Constitutional Law*, 2d 132.

lish a special trust fund within it for the sole benefit of local policy-holders on the theory that non-resident policy-holders would know in advance that they could not look to that fund. The reasoning is unconvincing. There are, however, certain businesses and callings whose pursuit a state may limit to its own residents. There have been included among them such a business as the selling of intoxicants,⁴⁴ that of a loan broker,⁴⁵ and that of insurance broker,⁴⁶ and such callings as those of an attorney,⁴⁷ doctor,⁴⁸ and even that of selling lightning-rods.⁴⁹ The exceptions to the general rule have usually been sustained on the theory that limiting the pursuit of those businesses or callings to residents or citizens was a reasonable and justifiable exercise of the state's police power.

The right of the citizens of one state to immunity from discriminatory taxation by another has always been deemed one of the immunities protected by the interstate privileges and immunities clause.⁵⁰ The important problem is to determine when the prohibited degree of discrimination exists. Identity of treatment of residents and non-residents is not required. A state may tax a given class of property owned by residents by one method and like property owned by non-residents by another method.⁵¹ This is not invalid merely because it produces a heavier tax on non-residents than residents in some years if in others it burdens the latter more heavily than the former.⁵² The discrimination in such case is not the inevitable result of the system. An inheritance tax system, however, that inevitably discriminates against non-resident decedents in its application to certain classes of cases is invalid as to them despite the fact that its application to other classes produced a discrimination

⁴⁴ *DeGrazier v. Stevens*, 101 Tex. 194, 105 S.W. 992, 16 L.R.A.,N.S., 1033, 16 Ann.Cas. 1059; *Welsh v. State*, 126 Ind. 71, 25 N.E. 883, 9 L.R.A. 664; *Mette v. McGuckin*, 18 Neb. 323, 25 N.W. 338, affirmed 149 U.S. 781, 13 S.Ct. 1050, 37 L.Ed. 959.

⁴⁵ *State v. Ware*, 79 Or. 367, 154 P. 905, 155 P. 364.

⁴⁶ *La Tourette v. McMaster*, 248 U. S. 465, 39 S.Ct. 160, 63 L.Ed. 362.

⁴⁷ *Keeley v. Evans*, D.C., 271 F. 520.

⁴⁸ *State ex rel. Kellogg v. Currens*, 111 Wis. 431, 87 N.W. 561, 56 L.R.A. 252; *France v. State*, 57 Ohio St. 1, 47 N.E. 1041.

⁴⁹ *State v. Stevens*, 78 N.H. 268, 99 A. 723, L.R.A.1917C, 528.

⁵⁰ *Corfield v. Coryell*, Fed.Cas.No. 3,230; *Smith v. Loughman*, 245 N.Y. 486, 157 N.E. 753.

⁵¹ *Travelers' Ins. Co. v. Conn.*, 185 U.S. 364, 22 S.Ct. 673, 46 L.Ed. 949.

⁵² *Travelers' Ins. Co. v. Connecticut*, *supra*.

in favor of non-resident decedents.⁵³ A discrimination in respect of one act does not cease to be such because a special favor is conferred in connection with a different and unrelated act.⁵⁴ The decisive factor is the inevitable persistence of the discrimination against non-residents in favor of residents in situations that are dissimilar only in respect to the residence of the taxpayer. An occasional or accidental discrimination due to factors specific to the particular case does not invalidate a tax even in that case.⁵⁵ It would seem that, where the existence and persistence of a discrimination against non-residents cannot be determined from the terms of the statute, they will have to be established by actual experience under the statute. This is the only possible method where wholly different systems are applied to residents and non-residents. The existence of discrimination against non-residents is easily established where they are denied an exemption conferred upon residents. Such a discrimination has been invariably held invalid regardless of the character of the tax.⁵⁶ It cannot be justified by granting non-residents slight advantages in other respects in connection with the same tax.⁵⁷ It is not validated by providing that non-residents shall be accorded the exemption if the state of their residence in imposing a similar tax confers a reciprocal exemption upon residents of the taxing state since one state's discrimination against the citizens of other states cannot be cured by like discrimination by the latter against citizens of the former.⁵⁸ A state may, in imposing taxes, grant its residents some advantages denied non-residents since not every difference in treatment favoring the former is deemed a discrimination against the latter. A state's power to tax residents is more extensive than its power to tax non-residents. It may tax the former on income from sources outside it, but may tax the latter on income from local sources only. The interstate privileges and immunities clause does not prevent it from adjusting its income tax system to that difference by permitting residents to deduct

⁵³ *Smith v. Loughman*, 245 N.Y. 486, 157 N.E. 753.

⁵⁴ *Smith v. Loughman*, *supra*.

⁵⁵ *Maxwell v. Bugbee*, 250 U.S. 525, 40 S.Ct. 2, 63 L.Ed. 1124.

⁵⁶ *In re Johnson's Estate*, 139 Cal. 532, 73 P. 424, 96 Am.St.Rep. 161; *Sprague v. Fletcher*, 69 Vt. 69, 37 A.

239, 37 L.R.A. 840; *Oliver v. Washington Mills*, 11 Allen, Mass., 268.

⁵⁷ *TRAVIS v. YALE & TOWNE MFG. CO.*, 252 U.S. 60, 40 S.Ct. 228, 64 L.Ed. 460, Black's Cas. Constitutional Law, 2d 143.

⁵⁸ *TRAVIS v. YALE & TOWNE MFG. CO.*, *supra*.

losses wherever incurred while limiting non-residents to the deduction of those incurred within the state.⁵⁹ The same principle would permit any other adjustments whose principal tendency would be rather to prevent unfair and unreasonable discriminations against residents than to impose them on non-residents. A state may also limit collection of income taxes at the source to those due from non-residents since this does not affect their tax burden.⁶⁰ The constitutional provision in question requires a reasonable equality, not a mathematical equivalence, of the tax burden imposed by a state upon its citizens and the citizens of other states. It is directed against actual, not purely formal, differences in their tax burdens. A state tax on the income of both residents and non-residents does not discriminate against the latter by exempting residents from a property tax imposed on non-residents even if it be assumed that an income tax is a personal tax in the case of the former and a property tax with respect to the latter. That purely formal difference in the legal character of the tax on the two classes has no effect upon their respective tax burdens.⁶¹ The cases that have construed this provision have all involved differences of treatment in connection with a single kind of tax, and have not discussed the extent to which conferring an advantage upon residents in connection with one kind of tax might be justified by compensating advantages conferred upon non-residents in connection with other kinds of taxes. They have dealt with the comparative treatment of residents and non-residents under a particular tax rather than under a state's entire tax system. The clause in question clearly prohibits a state from discriminating against non-residents by adjusting its entire tax system so as to produce that result, but the most effective method for assuring them their constitutional right to non-discriminatory treatment is to require it with respect to each particular tax in that system.⁶² Existing decisions have adopted that approach.

⁵⁹ *Shaffer v. Carter*, 252 U.S. 37, 40 S.Ct. 221, 64 L.Ed. 445.

⁶⁰ *TRAVIS v. YALE & TOWNE MFG. CO.*, *supra*.

⁶¹ *Shaffer v. Carter*, *supra*.

⁶² The terms "resident" and "non-resident" have been used throughout the discussion to conform to the

language in the cases cited and to reflect the fact that the statutes involved in those cases made "residence" the basis of classification. The courts, in the cited cases, either assumed, or specifically held, that the adoption of that basis of classification produced a classification between citizens of the taxing state and citizens of other states.

A state's power to define the jurisdiction of its own courts is subject to certain limitations imposed by the federal Constitution. The interstate privileges and immunities clause constitutes one such restriction. The right to sue in its courts may not be wholly denied citizens of other states by a state that accords its own citizens access to its courts.⁶³ Any policy it may adopt in this matter must operate in substantially the same manner upon its own citizens and those of other states.⁶⁴ It need not, however, give citizens of other states access to its courts on exactly the same terms as it does its own citizens. The constitutional requirements are satisfied if the former are given access to a state's courts on terms which in themselves are reasonable and adequate for enforcing any rights they may have.⁶⁵ It may, therefore, deny others than its own citizens the right to sue in its courts on a foreign cause of action against which the statute of limitations of the place where the cause of action arose has run while permitting its own citizens to sue thereon after such time if it has accorded the former a reasonable time within which to sue thereon in its courts.⁶⁶ The citizen of another state cannot demand the same length of time that the state grants its own citizens. A statute of limitations excluding the period of a defendant's absence from the state only where the plaintiff is a resident has also been sustained.⁶⁷ A requirement that plaintiffs furnish security for costs may be limited to non-residents,⁶⁸ and the privilege of suing in forma pauperis may be confined to citizens of the state.⁶⁹ A state may not, however, restrict to non-residents liability to arrest and bail in a given class of civil actions.⁷⁰ It is only where the conditions imposed on citizens of other states deprive them of a reasonably adequate method for enforcing their rights in the courts of another state that the latter's action is deemed to violate this constitutional

⁶³ *Chambers v. Baltimore & O. R. Co.*, 207 U.S. 142, 28 S.Ct. 34, 52 L.Ed. 143; *CANADIAN NORTHERN RY. CO. v. EGGEN*, 252 U.S. 553, 40 S.Ct. 402, 64 L.Ed. 713, *Black's Cas. Constitutional Law*, 2d 140.

⁶⁴ *Chambers v. Baltimore & O. R. Co.*, *supra*.

⁶⁵ *CANADIAN NORTHERN RY. CO. v. EGGEN*, *supra*.

⁶⁶ *CANADIAN NORTHERN RY. CO. v. EGGEN*, *supra*.

⁶⁷ *Chemung Canal Bank v. Lowery*, 93 U.S. 72, 23 L.Ed. 806.

⁶⁸ *Holt v. Tennallytown & R. R. Co.*, 81 Md. 219, 31 A. 809; *Cummings v. Wingo*, 31 S.C. 427, 10 S.E. 107.

⁶⁹ *White v. Walker*, 136 La. 464, 67 So. 332.

⁷⁰ *Little v. Miles*, 204 N.C. 646, 169 S.E. 220.

provision. A reasonable regulation of that right is permissible. A state sometimes excludes transitory actions from the jurisdiction of its courts on the basis of the residence of one or both of the parties thereto. The courts have shown a decided tendency to sustain statutes excluding from a state court's jurisdiction transitory actions arising outside the state in favor of non-residents against other non-residents or foreign corporations, and statutes conferring upon its courts discretionary power to decline jurisdiction in such cases.⁷¹ They have given greater effect to the fact that the basis of the classification was residence than in other fields, even though the statutes might in fact operate to create a classification between citizens of the state and those of other states. A cause of action may arise in favor of one person as the result of an injury inflicted upon another. It has been held that a statute limiting the jurisdiction of a state's courts in cases of that character to those in which the latter party was a citizen of the state did not deny the non-resident owner of the cause of action his rights under the interstate privileges and immunities clause since the basis of jurisdiction was not the citizenship of the plaintiff but that of the injured person.⁷² It was recognized that the statute would have been invalid had it limited jurisdiction to cases in which the owner of the cause of action was a citizen of the state. There have been found no cases involving statutes limiting jurisdiction by the sole factor of the residence or citizenship of the defendant. The principles governing access of the citizens of other states to a state's courts extends to administrative tribunals empowered to grant awards under workmen's compensation acts.⁷³

The terms of the interstate privileges and immunities clause require equality of treatment only between the citizens of a state and those of other states. The majority of the cases that have arisen under it have involved legislative classifications based on residence. This has confronted the courts with the problem of preventing a state from evading the limitations of the provision by making residence instead of citizenship the basis of its classifications. If a statute clearly intends to include among

⁷¹ *Loftus v. Pennsylvania R. Co.*, 107 Ohio St. 352, 140 N.E. 94; *Robinson v. Oceanic Steam Nav. Co.*, 112 N.Y. 315, 19 N.E. 625, 2 L.R.A. 636; *Douglas v. New York, N. H. & H. R. Co.*, 279 U.S. 377, 49 S.Ct. 355, 73 L. Ed. 747.

⁷² *Chambers v. Baltimore & O. R. Co.*, 207 U.S. 142, 28 S.Ct. 34, 52 L. Ed. 143.

⁷³ *Quong Ham Wah Co. v. Industrial Accident Commission*, 184 Cal. 26, 192 P. 1021, 12 A.L.R. 1190.

residents citizens of other states resident within the state, and among non-residents those of its own citizens who reside outside it, the classification will not be deemed equivalent to one based on citizenship.⁷⁴ It is, however, the general rule that a classification, whatever its basis, whose practical operation produces discrimination against the citizens of other states in favor of a state's own citizens will be held violative of this provision.⁷⁵ A taxing statute that imposed a heavier tax on contractors whose principal office was outside the state than on those with their principal office within it was held invalid on that basis.⁷⁶ The courts have sustained classifications based on residence more frequently where statutes dealing with access to a state's courts have been involved than where other interests of non-residents have been concerned. They have tended to treat a classification based on residence equivalent to one based on citizenship particularly in matters of taxation.

The power of a state to waive the rights conferred upon its citizens by this constitutional provision has received but little consideration from the courts. The Supreme Court discussed it in passing on a state's contention that a discrimination against the citizens of other states would not violate this clause if the statute creating it should provide that the discrimination would be removed in favor of the citizens of any state that had, or should enact, similar laws conferring reciprocal rights upon the former's citizens. The claim was rejected, and it was stated that a state might not barter away the constitutional right of its citizens to enjoy the privileges and immunities of citizens in other states, that discrimination could not be cured by retaliation, and that the prevention of those things was one of the principal ends sought in adopting the Constitution.⁷⁷

⁷⁴ *La Tourette v. McMaster*, 248 U. S. 465, 39 S.Ct. 160, 63 L.Ed. 362.

⁷⁵ *TRAVIS v. YALE & TOWNE MFG. CO.*, 252 U.S. 60, 40 S.Ct. 228, 64 L.Ed. 460, *Black's Cas. Constitutional Law*, 2d 143; *Smith v. Loughman*, 245 N.Y. 486, 157 N.E. 753.

⁷⁶ *Chalker v. Birmingham & N. W. Ry. Co.*, 249 U.S. 522, 39 S.Ct., 366, 63 L.Ed. 748.

⁷⁷ *TRAVIS v. YALE & TOWNE MFG. CO.*, *supra*.

FULL FAITH AND CREDIT CLAUSE

100. The Constitution provides that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

Article 4, Section 1, of the federal Constitution requires each state to give full faith and credit to the public acts, records and judicial proceedings of every other state. It also empowers Congress to prescribe by general laws the manner in which such acts, records and proceedings shall be proved, and the effect to be given them in such other states. The general purpose of this provision is to "alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin."⁷⁸ It does not give the statutes of one state extraterritorial force as law in another. It does, however, require a state to give them the same faith and credit which they would have in their own state whenever a matter properly determinable by them arises in a judicial or other proceeding within it. This involves the recognition by it of rights conferred, and obligations imposed, by the statutes of another state so far as their creation is within the latter's power.⁷⁹ There are certain well recognized exceptions to this general principle. No state is required to enforce the penal laws of another, nor any judgments for penalties based thereon.⁸⁰ The tax laws of a state have also been held not entitled to enforcement in another state,⁸¹ but some doubts have been cast on that position by a recent decision requiring judg-

⁷⁸ *Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 56 S.Ct. 229, 80 L.Ed. 220.

⁷⁹ *Broderick v. Rosner*, 294 U.S. 629, 55 S.Ct. 589, 79 L.Ed. 1100, 100 A.L.R. 1133.

⁸⁰ *Wisconsin v. Pelican Ins. Co.*,

127 U.S. 265, 8 S.Ct. 1370, 32 L.Ed. 239; *Huntington v. Attrill*, 146 U.S. 657, 13 S.Ct. 224, 36 L.Ed. 1123.

⁸¹ *Moore v. Mitchell*, 2 Cir., 30 F. 2d 600, 65 A.L.R. 1354, affirmed on other grounds, 281 U.S. 18, 50 S.Ct. 175, 74 L.Ed. 673.

ments for taxes to be recognized in other states.⁸² The right of a state to refuse recognition to rights and obligations created in another state in order to protect a local policy has been recognized, but its scope has been stated to be an exceedingly narrow one.⁸³

The duty to recognize foreign rights and obligations exists only where their creation is within the power of the state under whose laws they are alleged to arise. The question of what is the proper law governing transactions has thus become, in many situations, one of constitutional law. The powers of a corporation over its members, its relation to them, and their relations among themselves, are governed by the law of the state of its incorporation, even as to members joining it in another state.⁸⁴ Liabilities attached to membership by its laws, if nonpenal in character, must be recognized by other states, and, if those laws vest the cause of action for the enforcement of those liabilities in a designated official or other person, his right to enforce it may not be denied by them.⁸⁵ A state is not, however, required to permit their enforcement by one who could not do so under the laws of the state of incorporation in that state's own courts.⁸⁶ A defense accorded a party to a contract by a statute of the state in which the contract was entered into must be recognized as such in another state in which a suit is brought on the contract.⁸⁷ This has been extended to require the state in which an injury occurred to recognize the statute of the state in which the employment contract was entered into which made the remedies under its workmen's compensation act exclusive even in the case of injuries occurring without that state.⁸⁸ The effect

⁸² *Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 56 S.Ct. 229, 80 L.Ed. 220.

⁸³ *Broderick v. Rosner*, 294 U.S. 629, 55 S.Ct. 589, 79 L.Ed. 1100, 100 A.L.R. 1133.

⁸⁴ *Supreme Council of Royal Arcanum v. Green*, 237 U.S. 531, 35 S.Ct. 724, 59 L.Ed. 1089, L.R.A.1916A, 771; *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662, 35 S.Ct. 692, 59 L.Ed. 1165, L.R.A.1916A, 765.

⁸⁵ *Converse v. Hamilton*, 224 U.S. 243, 32 S.Ct. 415, 56 L.Ed. 749, Ann. Cas.1913D, 1292; *Broderick v. Ros-*

ner, 294 U.S. 629, 55 S.Ct. 589, 79 L.Ed. 1100, 100 A.L.R. 1133; *Hancock Nat. Bank v. Farnum*, 176 U.S. 640, 20 S.Ct. 506, 44 L.Ed. 619.

⁸⁶ *Finney v. Guy*, 189 U.S. 335, 23 S.Ct. 558, 47 L.Ed. 839.

⁸⁷ *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178, 57 S.Ct. 129, 81 L.Ed. 106.

⁸⁸ *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145, 52 S.Ct. 571, 76 L.Ed. 1026, 82 A.L.R. 696. Cf. *Ohio v. Chattanooga Boiler & Tank Co.*, 289 U.S. 439, 53 S.Ct. 663, 77 L.Ed. 1307.

of that requirement was to deprive the state in which the injury occurred of power to apply its own law thereto. If the contract calls for employment outside the state in which it is entered into, that state has been held not to deny full faith and credit to the public acts of the jurisdiction in which the injury occurred by refusing to apply the latter's compensation act in the case of an injury occurring within it.⁸⁹ The state in which the contract had been entered into was allowed to apply its own workmen's compensation act. The decisive factor was that its interest was superior to that of the other jurisdiction in the particular case. Where, however, the interest of the place of injury is superior it may apply its own law and is not required to apply that of the place where the contract was entered into.⁹⁰ These cases typify situations in which local policy is permitted to prevail over the logical consequences of the usual principles governing the creation of rights. It is the general rule that each state has the exclusive power to regulate the creation of rights in property situated within it. It need not, therefore, give to the acts or proceedings of other states that effect in determining rights to property within it which those states give thereto in respect of property situated within them.⁹¹ It has, however, been held that if the statutes of the state of incorporation, and judicial proceedings thereunder, effect a transfer of the corporation's assets to a designated person, his title to the property in another state must be recognized by the latter,⁹² but that it need not recognize the laws of the former state governing the distribution of such property among the corporate creditors.⁹³

A state which is admittedly the proper one for creating a right or cause of action sometimes limits the right to sue thereon to courts within the state. The full faith and credit clause does not require other states to recognize such a limitation.⁹⁴ They need

⁸⁹ *Alaska Packers' Ass'n v. Industrial Accident Commission of California*, 294 U.S. 532, 55 S.Ct. 518, 79 L.Ed. 1044.

⁹⁰ *United States Casualty Co. v. Hoage*, 64 App.D.C. 284, 77 F.2d 542.

⁹¹ *Hood v. McGehee*, 237 U.S. 611, 35 S.Ct. 718, 59 L.Ed. 1144; *Olmsted v. Olmsted*, 216 U.S. 386, 30 S.Ct. 292, 54 L.Ed. 530, 25 L.R.A.,N.S., 1292; *Clarke v. Clarke*, 178 U.S. 186, 20 S.Ct. 873, 44 L.Ed. 1028.

⁹² *Clark v. Williard*, 292 U.S. 112, 54 S.Ct. 615, 78 L.Ed. 1160.

⁹³ *Clark v. Williard*, 294 U.S. 211, 55 S.Ct. 356, 79 L.Ed. 865.

⁹⁴ *Atchison, T. & S. F. Ry. Co. v. Sowers*, 213 U.S. 55, 29 S.Ct. 397, 53 L.Ed. 695; *Tennessee Coal & Iron & R. Co. v. George*, 233 U.S. 354, 34 S.Ct. 587, 58 L.Ed. 997, L.R.A. 1916D, 685.

give such credit only to those substantial provisions of the statute as inhere in the cause of action, or which name conditions on which the right to sue depends. The venue of an action is not one of these. A state's attempt thus to limit the venue of a transitory cause of action created by its statute is deemed an invalid attempt to give its laws extraterritorial effect.

A state is not permitted wholly to defeat a right created by the public act of another state by denying its courts of general jurisdiction the power to enforce it,⁹⁵ or by providing a remedy so burdened that it is practically impossible to enforce it.⁹⁶ The full faith and credit clause does, to that extent at least, limit a state in defining the jurisdiction of its courts over transitory actions. Nor can it escape its obligation by treating as matter of remedy that which is a matter of substantive right under the law of the place creating the right or defense asserted.⁹⁷ The law of one state is, however, matter of fact to be proved as such when an issue involving it arises in the courts of another state,⁹⁸ but statutes in many states now require their courts to take judicial notice of the statutes of other states. It is not denied the faith and credit to which it is entitled if the court of another state misconstrues it without denying its validity. Article 4, Section 1, is not a guaranty that the public acts of one state, including its constitution, shall not be misconstrued by the courts of another.⁹⁹

The same constitutional provision requires each state to give full faith and credit to the judicial proceedings of every other state as a constitutional duty and not merely as a matter of comity, as would be the case but for this provision. Congress has exercised its power to prescribe the manner in which such proceedings shall be proved, and the effect that shall be given them, by providing that they shall have the same faith and credit given them by every court within the United States that they have by law or usage in the courts of the state from whence the records are taken.¹ The judgment of a court of competent

⁹⁵ *Converse v. Hamilton*, 224 U.S. 243, 32 S.Ct. 415, 56 L.Ed. 749, Ann. Cas.1913D, 1292.

⁹⁶ *Chicago & A. R. Co. v. Wiggins Ferry Co.*, 119 U.S. 615, 7 S.Ct. 398, 30 L.Ed. 519.

⁹⁷ *Broderick v. Rosner*, 294 U.S. 629, 55 S.Ct. 589, 79 L.Ed. 1100.

⁹⁸ *Smithsonian Institution v. St. John*, 214 U.S. 19, 29 S.Ct. 601, 53 L. Ed. 892.

⁹⁹ *John Hancock Mut. L. Ins. Co. v. Yates*, 299 U.S. 178, 57 S.Ct. 129, 81 L.Ed. 106.

1 R.S. 905, 906.

jurisdiction creates rights and duties, and has certain other effects, within the state by whose court it was rendered. It operates as *res judicata* as to all matters properly adjudicated therein, is not re-examinable upon the merits, and constitutes the basis for executory process for its enforcement. The full faith and credit clause and the Congressional legislation implementing it do not require a state to give all these effects to the judgments of a sister state. It need not issue executory process for their direct enforcement therein.² It must, however, accept them as conclusive evidence of the matters adjudicated therein, may not re-examine them upon the merits, nor impeach them for fraud in obtaining them.³ The only defenses that can be interposed to enforcing a sister state judgment are those that could be relied upon in a suit thereon in the state whose court rendered it.⁴ This rule is applied even where the judgment is based on a cause of action arising in the state where enforcement is sought. It is no defense in such case that the legal existence of the cause of action in the latter state had terminated when the action eventuating in the judgment was begun,⁵ nor that the court rendering the judgment committed error in construing the law of the state where enforcement is sought as creating the cause of action on which the judgment was based.⁶ The result of this principle frequently defeats a valid local policy of the latter state. It has compelled a state in which gambling contracts were void indirectly to enforce such contracts by requiring it to enforce a sister state judgment based on such a contract.⁷ A state may, however, apply its own applicable statute of limitations when suits on sister state judgments are brought in its courts since such statutes affect the remedy only and do not involve a denial of the rights conferred by such judgment.⁸ The duty to treat the judgment of a court of another

² *Claffin v. McDermott*, C.C., 12 F. 375; *Walser v. Seligman*, C.C., 13 F. 415.

³ *Mills v. Duryee*, 7 Cranch 481, 3 L.Ed. 411; *Hanley v. Donoghue*, 116 U.S. 1, 6 S.Ct. 242, 29 L.Ed. 535; *M'Elmoyle v. Cohen*, 13 Pet. 312, 10 L.Ed. 177; *D'Arcy v. Ketchum*, 11 How. 165, 13 L.Ed. 648.

⁴ *Roche v. McDonald*, 275 U.S. 449, 48 S.Ct. 142, 72 L.Ed. 365, 53 A.L.R. 1141.

⁵ *Roche v. McDonald*; *supra*.

⁶ *FAUNTLEROY v. LUM*, 210 U.S. 230, 28 S.Ct. 641, 52 L.Ed. 1039, *Black's Cas. Constitutional Law*, 2d 147.

⁷ *FAUNTLEROY v. LUM*, *supra*.

⁸ *M'Elmoyle v. Cohen*, 13 Pet. 312, 10 L.Ed. 177. *Bacon v. Howard*, 20 How. 22, 15 L.Ed. 811.

state as *res judicata* and as a defense to an action in a state court exists whenever the two actions are in substance, even though not in form, identical.⁹ Nor does the effect of a judgment as an estoppel depend on its having been rendered in a suit instituted before that in which it is so pleaded.¹⁰

The preceding paragraph has considered the measure of a state's duty when a sister state judgment is sued on, or used by way of defense, in its courts. A state is not, however, required to provide for the enforcement of all such judgments in its courts. Those based on penal statutes need not be enforced, and whether a statute is penal in this connection depends on whether its purpose is the punishment of an offense against public justice or to afford a private remedy to a person injured by a wrongful act.¹¹ Judgments for taxes cannot be denied enforcement by another state merely on that account.¹² No state can be permitted to have a local policy against the payment of taxes due other states. It is clear that the purpose of the full faith and credit clause could be defeated if the states were wholly free to define the jurisdiction of their courts so as to exclude actions on sister state judgments. That clause has been held not to require a state to furnish a court for the enforcement of sister state judgments regardless of every other consideration.¹³ It has, however, been held that a state may not exclude from its courts actions based on such judgments merely because a suit could not have been maintained therein on the original cause of action.¹⁴ The opinion in this case specifically stated that, while the Constitution did not require a state to furnish a court, there were decided limits to its power of exclusion and to its "power to consider the nature of the cause of action before the foreign judgment based thereon is given effect," and that a state could not escape its constitutional obligation by the simple device of denying jurisdiction in such cases to courts otherwise competent. This was in line with a former decision invalidating a state statute denying its courts jurisdiction of suits on foreign judgments

⁹ *Chicago, R. I. & P. R. Co. v. White Co.*, 296 U.S. 268, 56 S.Ct. 229, Schendel, 270 U.S. 611, 46 S.Ct. 420, 80 L.Ed. 220.
70 L.Ed. 757, 53 A.L.R. 1265.

¹⁰ *Chicago, R. I. & P. R. Co. v. Schendel*, *supra*.

¹¹ *Huntington v. Attrill*, 146 U.S. 657, 13 S.Ct. 224, 36 L.Ed. 1123.

¹² *Milwaukee County v. M. E.*

¹³ *Anglo-American Provision Co. v. Davis Provision Co.*, 191 U.S. 373, 24 S.Ct. 92, 48 L.Ed. 225.

¹⁴ *Kenney v. Supreme Lodge of the World, L. Order of Moose*, 252 U.S. 411, 40 S.Ct. 371, 64 L.Ed. 638, 10 A. L.R. 716.

based on causes of action arising within it against which its statute of limitations had run.¹⁵ The principle on which these decisions rest is that only a most important local policy can justify an exception to the complete realization of the policy intended to be protected and promoted by the full faith and credit clause. In determining what local policy of the state in which enforcement is sought is of sufficient importance to override the policy embodied in the full faith and credit clause, there may be taken into account the relative importance of the local policy of the state in which the judgment was rendered.¹⁶ The dominant policy, however, remains that embodied in the full faith and credit clause.

A judgment has no legal force even in the state in whose court it was obtained if that court lacked jurisdiction to render it. It is, therefore, entitled to no faith and credit in any other state. The extent to which the court in which effect is sought to be given it is bound by the findings on jurisdictional facts contained in the record of a judgment is a somewhat unsettled matter. It has been stated that their truth may always be inquired into by such court.¹⁷ This is clearly the rule when there has been no direct determination of the jurisdictional issue by the court which rendered it. It has, however, been held that, where the party attacking the judgment had invoked a direct determination on the validity of the service on which jurisdiction was based, had been fully heard thereon, and had permitted an adverse decision thereon to stand unreversed, the full faith and credit clause required the jurisdictional findings to be treated as *res judicata* on that issue.¹⁸ A similar principle has been impliedly recognized where the findings related to the jurisdiction over the subject matter by the board whose decision was upheld by the questioned judgment.¹⁹ It is clear that a court, which treats such a judgment of a sister state as one rendered by a court having jurisdiction to render it, does not deny it any faith and credit whatever, and that the real issue in such case is one of due proc-

¹⁵ *Christmas v. Russell*, 5 Wall. 290, 18 L.Ed. 475.

¹⁶ See *Milwaukee County v. M. E. White Co.*, *supra*.

¹⁷ *Thompson v. Whitman*, 18 Wall. 457, 21 L.Ed. 897; *National Exchange Bank v. Wiley*, 195 U.S. 257, 25 S.Ct. 70, 49 L.Ed. 184; *ADAMS v. SAENGER*, 303 U.S. 59; 58 S.Ct.

454, 82 L.Ed. 649, *Black's Cas. Constitutional Law*, 2d 149.

¹⁸ *Hall v. Wilder Mfg. Co.*, 316 Mo. 812, 293 S.W. 760, 52 A.L.R. 723; *Davis v. Davis*, 305 U.S. —, 59 S.Ct. 3, 83 L.Ed. —.

¹⁹ *Chicago, R. I. & P. R. Co. v. Schendel*, 270 U.S. 611, 46 S.Ct. 420, 70 L.Ed. 757, 53 A.L.R. 1265.

ess. The general rule is that its action in so doing does not violate due process.²⁰ The rule that permits every judgment to be attacked on jurisdictional grounds when sued on in the courts of other states, even though the party assailing it has already had a determination thereof after a full hearing thereon, subjects judgments to a greater uncertainty than necessary to protect the legitimate claims of defeated litigants. The rule under which the courts of one state accept determinations of their own jurisdiction by the courts of a sister state can be supported on the basis that it prevents the courts of one state from reviewing decisions made after a full hearing by the courts of a sister state, even though it may result in giving a court the power to make a conclusive determination of its own jurisdiction in a given case.

The facts necessary to confer jurisdiction depend on the character of the judgment. A judgment in an action in rem is not binding unless the court had jurisdiction of the res, and this can be obtained only by a court within the state in which the res is situated. Hence a decree of a court cannot of its own force effect a transfer of property situated in another state.²¹ It may, however, establish the rights and equities of the parties before the court in such property so as to require their recognition in the state of its situs and thus constitute an equitable defense to an action by one party to the original proceedings against the other party thereto.²² A judgment in an action in personam is not binding if the court rendering it had no jurisdiction of the defendant, and is entitled to no faith and credit in the courts of another state.²³ The facts necessary to give a court such jurisdiction are defined by the requirements of due process. Actions for divorce comprise a distinct class in the application of these jurisdictional requirements. The marriage relationship whose dissolution is the purpose of such actions is treated as a res. A judgment affecting it can be rendered only by the courts of a state having jurisdiction thereof. The factor that gives a

²⁰ *Chicago Life Ins. Co. v. Cherry*, 244 U.S. 25, 37 S.Ct. 492, 61 L.Ed. 906.

²¹ *Fall v. Eastin*, 215 U.S. 1, 30 S.Ct. 3, 54 L.Ed. 65, 23 L.R.A.,N.S., 924, 17 Ann.Cas. 853.

²² *Burnley v. Stevenson*, 24 Ohio St. 474, 15 Am.Rep. 621.

²³ *D'Arcy v. Ketchum*, 11 How. 165, 13 L.Ed. 648; *Reynolds v. Stockton*, 140 U.S. 254, 11 S.Ct. 773, 35 L.Ed. 464; *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 32 S.Ct. 641, 56 L.Ed. 1009, Ann.Cas.1913E, 875; *Hall v. Lanning*, 91 U.S. 160, 23 L.Ed. 271; *Board of Public Works v. Columbia College*, 17 Wall. 521, 21 L.Ed. 687.

state that jurisdiction is the domicile of the parties to the relation. A decree by the court of a state in which neither party is domiciled is invalid and entitled to no recognition in another state,²⁴ even though the defendant appeared in the action.²⁵ The difficulty arises in cases in which the person bringing the action is domiciled in the state in which proceedings are brought and the other party is not domiciled therein. It is universally held that, if the former is the state of matrimonial domicile, it has the requisite jurisdiction of the res, and its decree is entitled to recognition in other states so far as the duty to recognize it depends on jurisdiction of the res.²⁶ It was for long supposed to be the law that, where the parties were living apart in different states, the domicile of either had jurisdiction to grant a divorce.²⁷ This view was repudiated with confusing consequences in the case of *Haddock v. Haddock*, which decided that a decree rendered by a court of the state of the husband's domicile need not be recognized by the courts of the state of the wife's domicile where the husband had deserted his wife without just cause.²⁸ A dissenting opinion in that case severely criticized the majority theory making fault a jurisdictional factor, but the case has never been overruled. The reason for the confusion resulting from this decision is to be found in the other jurisdictional requirement for a valid decree. Due process requires that those whose interest in the res will be affected by the judgment in an action in rem be given notice of, and an opportunity to be heard in, the proceedings. Notice by publication is all that is required in such action if the court has jurisdiction of the res. As long as the prevailing view permitted the court of the domicile of either spouse to acquire jurisdiction of the res, jurisdiction of the defendant was readily obtainable by either state by service by publication. The decision has increased the risk that such service will be inadequate and that a decree based thereon will not have to be recognized in other states. It is still, however, the law that a decree rendered by a court of the state of the domicile of one of the spouses is entitled to recognition in the courts of other states if jurisdiction of the defendant was obtained by per-

²⁴ *Bell v. Bell*, 181 U.S. 175, 21 S. Ct. 551, 45 L.Ed. 804; *Streitwolf v. Streitwolf*, 181 U.S. 179, 21 S.Ct. 553, 45 L.Ed. 807.

²⁵ *Andrews v. Andrews*, 188 U.S. 14, 23 S.Ct. 237, 47 L.Ed. 366.

²⁶ *Atherton v. Atherton*, 181 U.S.

155, 21 S.Ct. 544, 45 L.Ed. 794; *Thompson v. Thompson*, 226 U.S. 551, 33 S.Ct. 129, 57 L.Ed. 347.

²⁷ *Cheever v. Wilson*, 9 Wall. 108, 19 L.Ed. 604.

²⁸ 201 U.S. 562, 26 S.Ct. 525, 50 L. Ed. 867, 5 Ann.Cas. 1.

sonal service within that state or if he or she entered a general appearance in the proceedings. The extent to which judgments awarding alimony are entitled to recognition in other states is defined by the principles applicable to other personal judgments.²⁹ Proceedings to determine the custody of minors are in the nature of proceedings in rem in which jurisdiction depends on the domicile of the minor. A decree in such proceedings rendered by a court of competent jurisdiction is not denied the credit to which it is entitled when the court of another state in which the minor subsequently became domiciled refuses to recognize the right of the person to whom that decree awarded the custody.³⁰ A judgment in any kind of action can demand no recognition under the full faith and credit clause if rendered by a court having no jurisdiction of the subject matter.³¹

The Constitution specifically confers upon Congress the power to prescribe how the public acts, records and proceedings of one state shall be proved in another, and to prescribe their effect therein. It has exercised this power to give such records and judicial proceedings the same faith and credit that is given them by law or usage in the courts of the state from which the records have been taken. It is an undetermined issue whether Congress could exercise this power so as to require the direct enforcement by one state of the judgments of another state.³²

INTERSTATE EXTRADITION

101. The Constitution provides that "a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."
102. Both the federal and state courts have jurisdiction, on habeas corpus, to inquire into the lawfulness of the custody in which an alleged criminal is held on the execution of a requisition for his surrender to the demanding state.

²⁹ *Sistare v. Sistare*, 218 U.S. 1, 30 S.Ct. 682, 54 L.Ed. 905, 28 L.R.A., N.S., 1068, 20 Ann.Cas. 1061; *Lynde v. Lynde*, 181 U.S. 183, 21 S.Ct. 555, 45 L.Ed. 810; *Yarborough v. Yarborough*, 200 U.S. 202, 54 S.Ct. 181, 78 L.Ed. 269, 90 A.L.R. 924.

³⁰ *State ex rel. Larson v. Larson*,

190 Minn. 489, 252 N.W. 329; *Griffin v. Griffin*, 95 Or. 78, 187 P. 598.

³¹ *Thompson v. Whitman*, 18 Wall. 457, 21 L.Ed. 897.

³² See W. W. Cook, *Powers of Congress Under the Full Faith and Credit Clause*, 28 Yale L.Jour. 421.

103. A person extradited from one state to another may be tried, in the latter state, not only for the offense with which he was charged in the requisition papers, but for any and all criminal charges which that state may have against him.

The provision of the Constitution set forth above imposes on each state a legal obligation to surrender fugitives from justice to the state having jurisdiction of the crime upon demand of the executive authority of the latter state. It has been described as in the nature of a treaty stipulation between the states, entered into for the purpose of securing a prompt and efficient administration of the criminal laws of the several states.³³ To carry its provisions into effect Congress has passed an act defining the duties of the states in this matter and prescribing the process of interstate extradition. It has been held that the duty imposed by this act upon the executive of the state from which extradition is demanded is not a discretionary, but a mere ministerial, duty.³⁴ The federal government, however, has no power to compel him to comply therewith either through its judicial or other departments.³⁵

The issuance of a requisition is authorized only when the person whose surrender is demanded is charged with an offense punishable under the laws of the state from which the requisition issues. It need not be an offense known to the common law, since the words "treason, felony, or other crime" as used in the Constitution include every offense forbidden and made punishable by the laws of the state where the crime is committed.³⁶ A person can be said to be charged with crime after conviction as well as before it, and an unsatisfied judgment of conviction constitutes a "charge" within the meaning of the Constitution. Hence a prisoner who has violated the terms of his parole is deemed charged with an offense when his return is demanded by the state that granted the parole.³⁷ This also applies to the case of a person who has left the state after his conviction but before commencement of his sentence.³⁸ These decisions recognize the principle that the purpose of the inter-

³³ Appleyard v. Massachusetts, 203 U.S. 222, 27 S.Ct. 122, 51 L.Ed. 161, 7 Ann.Cas. 1073.

³⁴ Kentucky v. Dennison, 24 How. 66, 16 L.Ed. 717.

³⁵ Kentucky v. Dennison, *supra*.

³⁶ Morton v. Skinner, 48 Ind. 123; Brown's Case, 112 Mass. 409, 17 Am. Rep. 114.

³⁷ Drinkall v. Spiegel, 68 Conn. 441, 36 A. 830, 36 L.R.A. 486.

³⁸ Hughes v. Pflanz, 6 Cir., 138 F. 980.

state extradition clause is to prevent the existence of the separate states from hampering the effective enforcement of its own criminal laws by each of the states by denying a right of asylum in other states to those who have violated its laws. It is not its purpose to give one state the power to pass judgment on the policy of the others so far as their systems of criminal law are concerned.

The state that demands that another state surrender to it an alleged criminal must prove that the person charged by it is a fugitive from its justice. A person is a fugitive from justice who, having been in the demanding state when the crime was committed, thereafter leaves that state and is found in the territory of another state.³⁹ It is not necessary to show that he left the former state for the purpose of escaping prosecution.⁴⁰ The sole test is presence within the demanding state at the time of the commission of the alleged offense. The presence must be actual, not merely constructive.⁴¹ Hence presence predicated on the legal fiction that a person follows the agency or instrumentality put in motion by him to accomplish a criminal purpose in another state will not support a claim that he is a fugitive from justice in such state.⁴² Presence at the time when the alleged offense was committed is equally essential. Presence thereafter followed by a subsequent departure from the state does not make one a fugitive from justice as to an offense committed while the person was not actually present in the demanding state.⁴³ Given actual presence at such time, however, a person is a fugitive from justice with respect to any given offense even if he leaves the state after conviction,⁴⁴ or while on parole.⁴⁵ A person indicted a second time for the same offense is none the less a fugitive from justice because, after the dismissal of the first indictment on which he had been originally

³⁹ *Appleyard v. Massachusetts*, 203 U.S. 222, 27 S.Ct. 122, 51 L.Ed. 161, 7 Ann.Cas. 1073.

⁴⁰ *Drew v. Thaw*, 235 U.S. 432, 35 S.Ct. 137, 59 L.Ed. 302; *McNichols v. Pease*, 207 U.S. 100, 28 S.Ct. 58, 52 L.Ed. 121; *Innes v. Tobin*, 240 U.S. 127, 36 S.Ct. 290, 60 L.Ed. 562; *Roberts v. Reilly*, 116 U.S. 80, 6 S.Ct. 201, 29 L.Ed. 544.

⁴¹ *Hyatt v. New York ex rel. Cork-*

ran, 188 U.S. 691, 23 S.Ct. 456, 47 L.Ed. 657.

⁴² *State v. Hall*, 115 N.C. 811, 20 S.E. 729, 28 L.R.A. 289, 44 Am.St.Rep. 501.

⁴³ *Hyatt v. New York ex rel. Corkran*, *supra*.

⁴⁴ *Hughes v. Pflanz*, 6 Cir., 138 F. 980.

⁴⁵ *Drinkall v. Spiegel*, 68 Conn. 441, 36 A. 830, 36 L.R.A. 486.

extradited, he left the state with the knowledge of the state authorities or without objection from them.⁴⁶ A person may be a fugitive from justice even in the state of his residence with respect to offenses committed while temporarily present in another state.⁴⁷

A person whose extradition is demanded has no right to demand a hearing before the governor of the state of asylum on the questions whether he has been substantially charged with a crime and whether he is a fugitive from justice.⁴⁸ The courts, however, have the power, on habeas corpus, to review the decision of the executive authority in extradition proceedings. A person arrested under a warrant of extradition from one state to another is in custody under or by color of the authority of the United States, and hence the federal courts have jurisdiction to inquire by habeas corpus into and determine the legality of the same.⁴⁹ The state courts have concurrent jurisdiction in this matter. The courts generally will not overrule the decisions of the governor in extradition cases unless they are clearly satisfied that an error has been committed.⁵⁰ The Constitution does not require that the state which has obtained custody of an alleged offender by extradition from another state shall try him only for the offense for which he was extradited, but it may try him on any and all charges which it may have against him.⁵¹ The fact that the Constitution provides for the interstate extradition of fugitives from justice confers no right upon any person to be brought back to the state from which he is a fugitive by the constitutionally provided method only. A state may try an alleged offender even though it acquired custody of him by stratagem or trick,⁵² or by forcibly abducting him and bringing him back to the state.⁵³ Nor, in such a case, is

⁴⁶ *Bassing v. Cady*, 208 U.S. 386, 28 S.Ct. 392, 52 L.Ed. 540, 13 Ann. Cas. 905. *Texas*, 155 U.S. 311, 15 S.Ct. 116, 39 L.Ed. 164.

⁴⁷ *In re Roberts*, D.C., 24 F. 132; *In re Keller*, D.C., 36 F. 681.

⁴⁸ *Munsey v. Clough*, 196 U.S. 364, 25 S.Ct. 282, 49 L.Ed. 515.

⁴⁹ *McNichols v. Pease*, 207 U.S. 100, 28 S.Ct. 58, 52 L.Ed. 121.

⁵⁰ *Robb v. Connolly*, 111 U.S. 624, 4 S.Ct. 544, 28 L.Ed. 542; *Pearce v.*

⁵¹ *Lascelles v. Georgia*, 148 U.S. 537, 13 S.Ct. 687, 37 L.Ed. 549; *Innes v. Tobin*, 240 U.S. 127, 36 S.Ct. 290, 60 L.Ed. 562.

⁵² *Pettibone v. Nichols*, 203 U.S. 192, 27 S.Ct. 111, 51 L.Ed. 148, 7 Ann.Cas. 1047.

⁵³ *Ker v. Illinois*, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421, 425; *Cook v. Hart*, 146 U.S. 183, 13 S.Ct. 40, 36

there any mode in which the state from which he was abducted, or the prisoner himself, can demand and secure his return to that state, under the Constitution.⁵⁴

COMPACTS BETWEEN THE STATES

104. The Constitution prohibits the states, without the consent of Congress, from entering into any agreement or compact with another state. This has been construed to require Congressional consent only where the agreement or compact is of a political character.

Agreements between the states have been made ever since the formation of the United States. This merely continued a practise existing even prior to the adoption of the Constitution. The provision of the Constitution that no state shall, without the consent of Congress, enter into any agreement or compact with another state⁵⁵ constitutes in effect a legal device for adjusting interstate relations while insuring that national interests shall not suffer in the process. There have been very few decisions defining the scope of the restrictions imposed by this clause on the powers of the states, but the dicta in the opinions rendered in those decisions have given a fairly clear indication of the lines along which future decisions are likely to go. The subsequent discussion is based largely on those dicta. The clause does not prohibit every character of interstate agreement not assented to by Congress. An agreement for the construction of a bridge over a boundary river has been held not to require Congressional assent,⁵⁶ and the same is true of an agreement between two states for the construction of a railroad.⁵⁷ It has been stated that it would be unnecessary to secure the consent of Congress to an agreement between two states under which one acquired from the other property owned by the latter within the former's territory, nor to other types of commercial agreement between them.⁵⁸ It has also been held that an agreement for the selection of parties to run and designate the bound-

L.Ed. 934; *Mahon v. Justice*, 127 U. S. 700, 8 S.Ct. 1204, 32 L.Ed. 283.

⁵⁶ *Dover v. Portsmouth Bridge*, 17 N.H. 200.

⁵⁴ *Mahon v. Justice*, 127 U.S. 700, 8 S.Ct. 1204, 32 L.Ed. 283.

⁵⁷ *Union Branch R. Co. v. East Tennessee & Georgia R. Co.*, 14 Ga. 327.

⁵⁵ U.S.C.A.Const., Art. 1, Sec. 10, Cl. 3.

⁵⁸ *Virginia v. Tennessee*, 148 U.S. 583, 13 S.Ct. 728, 37 L.Ed. 537.

any line between two states, or to designate what line should be run, would not require Congressional assent since it would import no agreement to accept the line thus run.⁵⁹ Such consent would, however, be required if there were a mutual agreement to accept such boundary, at least if its effect were or might be to increase the political power of the states involved and to encroach upon the full and free exercise of federal authority.⁶⁰ The principle that the Supreme Court has enunciated is that Congressional assent is required to the validity of an interstate compact or agreement only if it is political in character affecting the sovereignty of the affected states as between themselves or as between them and the federal government.⁶¹ Compacts or agreements not of this character are valid without such consent. It is well established that such consent may be given either before or after the compact is made, and may be either express or implied.⁶² It has never yet been determined whether there are any limits on the power of Congress to give its consent.

SUITS BETWEEN THE STATES

105. In order to provide for the peaceable settlement of controversies between the several states the federal judicial power was extended to controversies between two or more states. The Supreme Court was given original jurisdiction in such cases.

The mere existence of the states as elements in a federal system for the government of the people of the United States has not prevented controversies from arising between two or more states. The states are, however, powerless to resort to the arbitrament of force in their settlement of controversies between them. It was to provide the substitute of judicial settlement of at least some of such disputes that the judicial power of the United States was extended to "controversies between two or more states."⁶³ Cases of this character are included within the original jurisdiction of the Supreme Court.⁶⁴ The language

⁵⁹ *Virginia v. Tennessee*, *supra*.

⁶⁰ *Virginia v. Tennessee*, *supra*.

⁶¹ *Virginia v. Tennessee*, *supra*;
Wharton v. Wise, 153 U.S. 155, 14
S.Ct. 783, 787, 38 L.Ed. 669.

⁶² *Green v. Biddle*, 8 Wheat. 1, 5
L.Ed. 547.

⁶³ U.S.C.A.Const., Art. 3, Sec. 2, Cl.
1.

⁶⁴ U.S.C.A.Const., Art. 3, Sec. 2, Cl.
2.

of the Constitution has been construed to include only those controversies which are susceptible of judicial determination.⁶⁵ The most important cases with which the Court has dealt under this provision have been those involving boundary disputes between states.⁶⁶ These, however, do not cover the whole range of controversies between states susceptible to judicial solution. Cases directly affecting the property rights and interests of a state have invariably been included. Hence a state whose interests as the owner of its public institutions will be injured by the action of another state threatening its fuel supply for those institutions may invoke this jurisdiction to test the legality of such action.⁶⁷ This is also the case where the controversy involves claims by one state against another evidenced by the latter's bonds⁶⁸ or founded on the latter's assumption of an obligation to the former.⁶⁹ A state's quasi-sovereign interest in the general welfare of its residents will support an action by it against another state whose actions threaten it. It is on this basis that it may invoke this jurisdiction to prevent the acts of another state that pollute its streams or other waters,⁷⁰ that injure the lands of its citizens by flooding,⁷¹ or that deprive its residents of their customary supply of running water from an interstate stream rising in the defendant state.⁷² It has, however, been held that mere maladministration of a state's laws to the injury of the citizens of another state involves no controversy between the two states within the federal judicial power.⁷³ The Supreme Court has clearly and unequivocally asserted that its power to hear and determine controversies between states includes that of enforcing the judgment rendered in such cases.⁷⁴

⁶⁵ *Louisiana v. Texas*, 176 U.S. 1, 20 S.Ct. 251, 44 L.Ed. 347.

⁶⁶ *Rhode Island v. Massachusetts*, 12 Pet. 637, 9 L.Ed. 1233; *Michigan v. Wisconsin*, 270 U.S. 295, 46 S.Ct. 290, 70 L.Ed. 595.

⁶⁷ *Pennsylvania v. West Virginia*, 262 U.S. 553, 43 S.Ct. 858, 67 L.Ed. 1117, 32 A.L.R. 300.

⁶⁸ *South Dakota v. North Carolina*, 192 U.S. 286, 24 S.Ct. 269, 48 L.Ed. 448.

⁶⁹ *Virginia v. West Virginia*, 206 U.S. 290, 27 S.Ct. 732, 51 L.Ed. 1068.

⁷⁰ *Missouri v. Illinois*, 180 U.S. 208, 21 S.Ct. 331, 45 L.Ed. 497; *New York v. New Jersey*, 256 U.S. 296, 41 S.Ct. 492, 65 L.Ed. 937.

⁷¹ *North Dakota v. Minnesota*, 263 U.S. 365, 44 S.Ct. 138, 68 L.Ed. 342.

⁷² *KANSAS v. COLORADO*, 185 U.S. 125, 22 S.Ct. 552, 46 L.Ed. 838, *Black's Cas. Constitutional Law*, 2d 153; *Wyoming v. Colorado*, 259 U.S. 419, 42 S.Ct. 552, 66 L.Ed. 999.

⁷³ *Louisiana v. Texas*, 176 U.S. 1, 20 S.Ct. 251, 44 S.Ct. 347.

⁷⁴ *Virginia v. West Virginia*, 246 U.S. 565, 38 S.Ct. 400, 62 L.Ed. 883.

CHAPTER 6

THE POWERS OF CONGRESS

GENERAL CONSIDERATIONS

- 106. Constitution of Congress.
- 107. Organization and Government of Congress.
- 108. The Legislative Process.
- 109-110. Auxiliary Powers of Congress.
- 111-113. Defining the Scope of Congressional Powers.

CONSTITUTION OF CONGRESS

- 106. All legislative powers granted to the United States by the Constitution are vested in a Congress which consists of two coordinate branches, the Senate and the House of Representatives.

The legislative power is by far the most important of all governmental powers. The determination of the policies that shall be promoted by law belongs primarily to the legislature. The existence of the practice of the judicial review of legislation to determine its consonance with constitutional limitations thereon does in fact involve a restriction on the legislature's power of determining governmental policies. This is especially true with respect to those limitations that enunciate broad policies since it is practically impossible in many cases to determine whether the legislative policy is in conflict with them without judicial consideration of what are ultimately issues of policy. The scope of a legislature's power to define policy must, therefore, be deemed limited by this inevitable concomitant of our theory of judicial review. It should also be noted that the statement of the legislature's primary part in defining governmental policy within the limits permitted by the applicable constitutions has reference to the formal legal distribution of governmental powers. The actual practice under a constitution that confers this power upon the legislature may depart therefrom. The policies in fact pursued at any given time may have been formulated by the executive department and owe their legislative enactment in large part to its activity. The Constitution itself contemplates that the President shall participate to this extent in formulating legislative policies by providing in Article 2 that he shall "from time to

time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient." The activities of Congress often are greatly influenced by the President. The ultimate legal power to decide these matters is, however, vested in the legislature. Its action is generally required in order to make a policy legally effective. It should also be noted that the continuing functioning of judge-made law gives the judiciary a limited range of power to define governmental policies. Its decisions, other than those construing a constitution, are, however, subject to legislative revision or replacement.

The entire legislative power of the federal government is vested in the Congress of the United States.¹ This consists of a House of Representatives and a Senate. The former consists of members chosen every second year by the people of the several states. They are required to be apportioned among the several states on the basis of their respective populations, counting the whole number of persons in each state with the exception of Indians not taxed.² A representative must have attained the age of twenty-five years, have been seven years a citizen of the United States, and be, when elected, an inhabitant of the state in which he is chosen.³ The Senate is composed of two Senators from each state whose term of office is six years.⁴ Senators were formerly elected by the state legislatures, but are now chosen by direct popular election.⁵ A Senator is required to have attained thirty years of age, to have been nine years a citizen of the United States, and to be, when elected, an inhabitant of the state for which he is chosen.⁶ A person holding an office under the United States is not permitted to be a member of either house during his continuance in said office.⁷

¹ U.S.C.A.Const., Art. 1, Section 1.

² U.S.C.A.Const., Art. 1, Section 2; U.S.C.A.Const., Amend. 14, Section 2. The latter also provides for an adjustment in the basis of representation in the case of states denying the right to vote for designated officials to their male inhabitants unless the denial is for participation in rebellion or other crime. Quere, whether the provisions of the U.S.C.A.Const. Nineteenth Amendment prohibiting the denial of suffrage by a state on account of sex has eliminat-

ed the word "male" from said provision of the U.S.C.A.Const. Fourteenth Amendment.

³ U.S.C.A.Const., Art. 1, Section 2. See for a disqualifying factor U.S.C.A.Const., Amend. 14, Section 3.

⁴ U.S.C.A.Const., Art. 1, Section 3.

⁵ U.S.C.A.Const., Art. 1, Section 3; U.S.C.A.Const., Amend. 17, declared ratified on May 31, 1913.

⁶ U.S.C.A.Const., Art. 1, Section 3.

⁷ U.S.C.A.Const., Art. 1, Section 6.

The Congress is required to meet at least once in every year, and such meeting must begin at noon on the third day of January unless it shall by law appoint a different day.⁸ Special sessions of Congress, or of either house thereof, may be convened by the President.⁹

Election of Members of Congress

The Constitution expressly provides that the electors for representatives and senators in each state "shall have the qualifications requisite for electors of the most numerous branch of the state legislature."¹⁰ The right to vote for members of Congress is not an incident of federal citizenship.¹¹ The effect of the foregoing provision is to make the laws of each state a decisive factor in defining those entitled to vote for members of Congress. The state is, however, prevented from making either race, color, previous condition of servitude, or sex a basis for exclusion from the exercise of this right.¹² The right, though defined by state law, is one based on the federal Constitution, and Congress has the power to protect its exercise.¹³ The Constitution also provides that the "times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulation, except as to the places of choosing Senators."¹⁴ This provision confers upon Congress a general supervisory power over the matter, and permits it to take it over, in whole or in part, with the exception indicated.¹⁵ State laws are deemed to have been adopted by Congress so far as they are allowed to regulate those matters.¹⁶

⁸ U.S.C.A.Const., Amend. 20, Section 2, declared ratified on February 6, 1933. For prior provisions relating thereto see U.S.C.A.Const., Art. 1, Section 4.

⁹ U.S.C.A.Const., Art. 2, Section 3.

¹⁰ U.S.C.A.Const., Art. 1, Section 2; U.S.C.A.Const., Amend. 17, Section 1.

¹¹ *Minor v. Happersett*, 21 Wall. 162, 22 L.Ed. 627.

¹² See U.S.C.A.Const., Amendments 15 and 19.

¹³ *Ex parte Yarbrough*, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274; *Wiley*

v. Sinkler, 179 U.S. 58, 21 S.Ct. 17, 45 L.Ed. 84; *United States v. Mosley*, 238 U.S. 383, 35 S.Ct. 904, 59 L.Ed. 1355.

¹⁴ U.S.C.A.Const., Art. 1, Section 4. It is probable that the reason for the exception has disappeared with the substitution of popular election of senators for their election by the state legislatures.

¹⁵ *Ex parte Siebold*, 100 U.S. 371, 25 L.Ed. 717.

¹⁶ *Ex parte Siebold*, 100 U.S. 371, 25 L.Ed. 717.

It has been held that this provision permits Congress to punish frauds and other offenses committed in elections of its members even when committed by state officials in the administration of state laws governing such elections.¹⁷ It has been stated that the power of Congress under that provision includes that of enacting any legislation necessary to insure fair and honest elections even though these are being conducted under state laws.¹⁸ Its power thereunder is, however, limited to regulating those elections in which its members are chosen. The question has arisen whether the primary elections held under state law for the purpose of selecting the candidates of the several political parties for members of Congress are subject to federal regulation thereunder. It arose when an attempt was made to enforce the provisions of the Federal Corrupt Practices Act of 1910 against a candidate for a party nomination for the United States senatorship. That Act undertook, among other things, to limit the amount of money which any candidate for either house of Congress might expend in procuring his nomination or election. It was held by a majority of the Court that the elections referred to in the provision in question did not include such primaries, and that the statute could not be constitutionally applied to them.¹⁹ It was also held by four of the Justices that the Seventeenth Amendment providing for the popular election of Senators had not expanded the scope of the regulatory powers conferred by Section 4 of Article 1. Some of the Justices rejected these views. The principal opinion in opposition to them takes the position that the power of Congress extends over the whole process of choosing members of Congress, and that the close relation of the primary and the election in that process make congressional power over the former reasonably necessary and proper for realizing the purposes for which the power was conferred upon it. The decision has, however, never been expressly over-ruled,²⁰ but rests on so insecure a basis as to make

¹⁷ *Ex parte Siebold*, 100 U.S. 371, 25 L.Ed. 717.

¹⁸ *Ex parte Coy*, 127 U.S. 731, 8 S.Ct. 1263, 32 L.Ed. 274.

¹⁹ *Newberry v. United States*, 256 U.S. 232, 41 S.Ct. 469, 65 L.Ed. 913.

²⁰ The case *United States v. Wurzbach*, 280 U.S. 396, 50 S.Ct. 167, 74 L.Ed. 508, sustained a federal stat-

ute making it a crime for a candidate for Congress to solicit or receive funds for political purposes from federal officeholders or employees even as applied to one soliciting funds to finance his primary contest to secure a party nomination for membership in Congress. The decision, however, does not treat such statute as an exercise of the powers conferred upon Congress by U.S.C.A.

its reversal highly probable if the issue should again come before the Court. The Act is, of course, valid as applied to the elections in which members of Congress are finally chosen.²¹ Although the Constitution does require representatives to be apportioned among the states on the basis of their respective populations, the division of the state into districts for the election of the representatives allocated to it is left to the state legislature by the provisions of Article 1, Section 4. The term, "legislature", as used therein, means the state's lawmaking power, including the governor's veto power if that is a part thereof under the state's constitution. Where it is so included, a re-districting statute that is vetoed by the governor is invalid unless passed over his veto in the manner provided by the state constitution.²² Such a statute would also be ineffective if rejected by a popular referendum in a state whose constitution provided for such legislative machinery.²³

The Constitution also makes express provision for the filling of any vacancies that may happen in a state's representation in either house of Congress by requiring that the executive authority of the state shall issue writs of election to fill such vacancies.²⁴ It is further provided that, if any vacancy shall happen in a state's representation in the Senate, the legislature of the state may empower the executive thereof to make temporary appointments until the people fill the vacancy by an election as the legislature may direct.²⁵

The ultimate power of determining its membership is vested in each house of Congress by the provision of the Constitution that makes each house the judge of the elections, returns, and qualifications of its own members.²⁶ Each house may also expel a member with the concurrence of two thirds.²⁷ The exercise of neither of these powers is subject to any judicial control or review.

Const., Art. 1, Section 4, but of the power to protect federal employees against political solicitations.

²¹ *United States v. Cameron, D.C.*, 282 F. 684.

²² *Smiley v. Holm*, 285 U.S. 355, 52 S.Ct. 397, 76 L.Ed. 795.

²³ *State of Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 36 S.Ct. 708, 60 L.Ed. 1172.

²⁴ U.S.C.A.Const., Art. 1, Section 2; U.S.C.A.Const., Amend. 17, Section 2, which supplanted U.S.C.A.Const., Art. 1, Section 3.

²⁵ U.S.C.A.Const., Amend. 17, Section 2.

²⁶ U.S.C.A.Const., Art. 1, Section 5.

²⁷ U.S.C.A.Const., Art. 1, Section 5.

ORGANIZATION AND GOVERNMENT OF CONGRESS

107. The Constitution invests Congress as a body, and each house of Congress, with all needful powers to regulate its own organization and government.

The Constitution contains numerous provisions that deal with the conduct of its business by each house of Congress. The speaker of the House of Representatives is required to be chosen by it, but the Vice-President of the United States shall be the president of the Senate.²⁸ Each house may determine the rules of its proceedings and punish its members for disorderly behavior.²⁹ Each house is required to keep a journal of its proceedings, on which the yeas and nays of the members on any question shall be entered at the desire of one-fifth of those present.³⁰ A majority of each house constitutes a quorum for the transaction of business, but a smaller number may adjourn from day to day and compel the attendance of absent members in such manner and under such penalties as each house may provide.³¹ The Supreme Court has sustained a House rule authorizing the counting in of members who were present in the house but refused to vote, in order to make up a quorum.³² Neither house may, during a session of Congress, adjourn for more than three days or to any other place than that in which the two houses are sitting, without the consent of the other.³³ The Constitution also confers upon the members of both houses certain privileges and immunities in order that they may perform their duties without undue interference. The most important of these are the provisions that they shall not be questioned in any other place for any speech or debate in either house, and that they shall be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same.³⁴ The former of these immunities does not protect a member against the consequences of publishing outside of Congress matter spoken therein. Arrest for treason, felony and breach of the peace are expressly excluded from the

²⁸ U.S.C.A.Const., Art. 1, Section 2;
U.S.C.A.Const., Art. 1, Section 3.

²⁹ U.S.C.A.Const., Art. 1, Section 5.

³⁰ U.S.C.A.Const., Art. 1, Section 5.

³¹ U.S.C.A.Const., Art. 1, Section 5.

³² *United States v. Ballin*, 144 U.
S. 1, 12 S.Ct. 507, 36 L.Ed. 321.

³³ U.S.C.A.Const., Art. 1, Section 5.

³⁴ U.S.C.A.Const., Art. 1, Section 6.

latter immunity. Since these embrace all criminal offenses, the privilege of members from arrest extends only to arrest or detention on civil process or in civil cases.³⁵ Furthermore, it is limited to arrest, and does not include immunity from service of process in a civil action.³⁶

THE LEGISLATIVE PROCESS

108. The Constitution imposes certain requirements to be followed in the enactment of legislation by the Congress. All bills may be introduced in either house with the exception of bills for raising revenue which must originate in the House of Representatives. No bill that has passed both houses can become a law unless it is presented to the President of the United States who has a limited period during which he may either approve it or veto it. He cannot be deprived of his power to approve by adjournment of Congress prior to the expiration of said period. Bills vetoed by the President may become law by a two-thirds vote of each house.

The two houses of Congress are in general equal and co-ordinate in their legislative capacity. The only exception thereto is that bills for raising revenue must originate in the House, but the Senate may propose or concur with amendments as on other bills.³⁷ The scope of this power to propose amendments extends to any matter germane to the subject of the bill as transmitted from the House, even though it involves an entire change in the plan or subject of taxation. The corporate excise tax law of 1909, which originated in a Senate amendment to a tariff bill, was held a proper amendment, and the completed statute was sustained against a claimed violation of the foregoing constitutional provision.³⁸ Bills making appropriations of public funds may originate in either house, although they in fact generally originate in the House.³⁹

It is a part of our political theory of "checks and balances" to confer upon the executive department participation in the legislative process. Article 1, Section 7, of the Constitution

³⁵ *Williamson v. United States*, 207 U.S. 425, 28 S.Ct. 163, 52 L.Ed. 278.

³⁶ *LONG v. ANSELL*, 293 U.S. 76, 55 S.Ct. 21, 79 L.Ed. 208, *Black's Cas. Constitutional Law*, 2d 157.

³⁷ U.S.C.A.Const., Art. 1, Section 7.

³⁸ *Flint v. Stone Tracy Co.*, 220 U.S. 107, 31 S.Ct. 342, 55 L.Ed. 389, *Ann.Cas.*1912B, 1312.

³⁹ *Millard v. Roberts*, 202 U.S. 429, 26 S.Ct. 674, 50 L.Ed. 1090.

confers a veto power over legislation upon the President. It requires that every bill which has passed both houses be presented to the President before it becomes a law. He must either approve and sign it, or disapprove it and return it, with his objections, to the house in which it originated. In the former event it becomes a law; in the latter, the house to which it was returned shall reconsider it and, if passed by it by a two-thirds vote, it must be sent, together with the President's objections, to the other house which shall likewise reconsider it. If that house passes it by a two-thirds vote, it becomes a law. The two-thirds vote by which each house is required to enact a bill into law over the President's veto means two-thirds of a quorum and not of the entire membership.⁴⁰ Congress cannot, by adjournment, deprive the President of his power to sign a bill in order to give it the force of law. This issue has recently been definitely settled. The argument that the power of the President to sign a bill ended with the adjournment of the Congress that had passed it was derived by implication from the provision that a bill not returned by the President "within ten days (Sundays excepted) after it shall have been presented to him" shall be a law, "in the like manner as if he had signed it, unless the Congress shall by their adjournment prevent its return, in which case it shall not be a law." The Court construed this provision as intended to safeguard the President's opportunity to consider bills by preventing the adjournment of Congress from interfering therewith, and denied that the legislative character of the President's function in this matter required the conclusion that he must perform it while Congress was in session.⁴¹ A prior decision sustaining his power to approve bills during a recess of Congress was the principal authority relied upon.⁴² The quoted provision indicates that a bill that has passed both houses may become a law without the President's approval and signing if he fails to return it to the house in which it originated within ten days (Sundays excepted) after it was presented to him if Congress has not adjourned prior to the expiration of that ten day period. Its adjournment during that period cannot deprive the President of his power to sign a bill in order to

⁴⁰ *Missouri Pac. Ry. Co. v. Kansas*, U.S. 482, 52 S.Ct. 627, 76 L.Ed. 248, 276, 39 S.Ct. 93, 63 L.Ed. 239, 2 A.L.R. 1589.

⁴¹ *Edwards v. United States*, 286 U.S. 482, 52 S.Ct. 168, 44 L.Ed. 223.

⁴² *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 20 S.Ct. 168, 44 L.Ed. 223.

give it the force of law, but does enable him, by failing to sign it, to prevent it from becoming law since the provision last quoted specifically so provides. This method of preventing a bill from becoming a law is known as the pocket-veto. The Supreme Court has rejected the view that a bill becomes law, even without the President's approval, unless Congress is afforded an opportunity to reconsider it after its express veto by the President.⁴³ The ten day period during which the President is permitted to hold a bill means a period of ten consecutive calendar days (Sundays excepted) and not ten days during which Congress is in session.⁴⁴ A President can employ the method of the pocket-veto not only after an adjournment of the final session of a Congress whose legislative life has expired, but also after an adjournment of any session of a Congress. The term "adjournment" has been held to mean any adjournment which prevents the return of a bill to the house in which it originated, and "house" in that connection means "house in session."⁴⁵ A house is deemed to be in session within the meaning of that rule while it is in a temporary recess for not more than the three days for which it may adjourn without the consent of the other house, and the return of a vetoed bill to its Secretary is deemed a return thereof to it.⁴⁶ The same principle should apply where it has recessed for more than three days with the consent of the other house, but the Court has not yet passed on that matter. A concurring opinion in the case last cited took the position that a return to the Secretary of a house is not effective unless said officer is authorized to receive it, but that a recess may be an adjournment which prevents the President from returning a bill to such house if it is in recess on the last day on which the President is authorized to return it. In order to prevent Congressional evasion of the Presidential veto power over bills by calling particular measures "orders" or "resolutions", the Constitution has provided that all orders,

⁴³ *Okanogan, Methow, San Poelis, Nespelem, Colville and Lake Indian Tribes v. United States*, 279 U.S. 655, 49 S.Ct. 463, 73 L.Ed. 894, 64 A.L.R. 1434.

⁴⁴ *Okanogan, Methow, San Poelis, Nespelem, Colville and Lake Indian Tribes v. United States*, 279 U.S. 655, 49 S.Ct. 463, 73 L.Ed. 894, 64 A.L.R. 1434.

⁴⁵ *Okanogan, Methow, San Poelis, Nespelem, Colville and Lake Indian Tribes v. United States*, 279 U.S. 655, 49 S.Ct. 463, 73 L.Ed. 894, 64 A.L.R. 1434.

⁴⁶ *WRIGHT v. UNITED STATES*, 302 U.S. 583, 58 S.Ct. 395, 82 L.Ed. 439, *Black's Cas. Constitutional Law*, 2d 159.

resolutions and votes to which the concurrence of both houses may be necessary (except on the question of adjournment) shall take the same legislative course and be subject to the same veto power as a bill. Bills can be vetoed or approved only as a whole. The President is subject to no judicial control in his exercise of this power, and the Constitution has prescribed no limitations upon its exercise.

AUXILIARY POWERS OF CONGRESS

109. Each house of Congress possesses such auxiliary powers as are necessary to prevent obstruction by non-members of the effective exercise of its powers and the performance of its duties, and to compel non-members to furnish it with such informations as may be necessary to enable it properly to exercise those powers and perform those duties.
110. The most important of these powers is that of citing non-members for contempt of its authority, adjudging them in contempt thereof after trial, and punishing them therefor. The limits upon this power are defined by reference to the purposes for which it has been conferred upon each house.

Each house of Congress possesses certain auxiliary powers that it may use in aid of the exercise of the powers and functions conferred upon it, and to make its exercise thereof effective. One of the most important of these auxiliary powers is that of conducting inquiries for the discovery of data pertinent to its performance of the powers and functions expressly or impliedly conferred upon it. This power is constantly employed as a necessary and proper means for the effective performance of the legislative function, and its scope for that purpose has received a fairly precise judicial definition. The decisions have recognized that the power of inquiry would be futile if the houses of Congress were forced to depend upon the voluntary co-operation of non-members in the prosecution of their investigations.⁴⁷ It has, accordingly, been held that each house may itself, or through one of its committees, compel non-members to attend as witnesses, to testify, and to produce such relevant documentary evidence as may be within their possession or control, and that each house may enforce such orders in these matters by

⁴⁷ *McGrain v. Daugherty*, 273 U.S. 135, 47 S.Ct. 319, 71 L.Ed. 580, 50 A.L.R. 1.

declaring those who refuse to obey them in contempt of its authority and punishing them therefor.⁴⁸ The limits on its power to do these things for such purpose are defined by reference to the auxiliary character of the power. Neither house possesses a "general power of making inquiry into the private affairs of the citizens", but each house is limited to inquiries relating to matters within its jurisdiction and in respect of which it may validly act.⁴⁹ This principle limits not only the character of the inquiry in connection with which these powers may be validly utilized but also the character of the questions that may be asked of witnesses and of the documents whose production may be compelled. A non-member cannot, for instance, be declared in contempt and punished therefor because he has refused to answer a particular question relating to matters beyond the jurisdiction of the house conducting the inquiry even though the general investigation related to matters in respect of which it might validly act.⁵⁰ The Supreme Court has adopted a liberal view in determining whether the purpose of an inquiry and that for which a witness' testimony is demanded are the obtaining of information in aid of the legislative function,⁵¹ although it held an inquiry into the affairs of a bankrupt debtor of the United States to have been instituted for non-legislative purposes in the first case in which it passed on the power of one of the houses of Congress to compel non-members to testify before an investigating committee thereof.⁵² However, the fact that the powers of Congress include that of proposing constitutional amendments means that the powers of inquiry belonging to each house are practically unlimited. It should be observed that the exercise of these auxiliary powers in connection with inquiries for the purpose of securing data in aid of legislation is itself the exercise of a portion of the legislative power belonging to each house of Congress, and not the exercise of judicial power by it.⁵³

The power to declare non-members in contempt of its authority, and to punish them therefor, may also be exercised

⁴⁸ *McGrain v. Daugherty*, 273 U.S. 135, 47 S.Ct. 319, 71 L.Ed. 580, 50 A.L.R. 1.

⁴⁹ *Kilbourn v. Thompson*, 103 U.S. 168, 26 L.Ed. 377.

⁵⁰ *McGrain v. Daugherty*, 273 U.S. 135, 47 S.Ct. 319, 71 L.Ed. 580, 50 A.L.R. 1.

⁵¹ *McGrain v. Daugherty*, 273 U.S. 135, 47 S.Ct. 319, 71 L.Ed. 580, 50 A.L.R. 1.

⁵² *Kilbourn v. Thompson*, 103 U.S. 168, 26 L.Ed. 377.

⁵³ *McGrain v. Daugherty*, 273 U.S. 135, 47 S.Ct. 319, 71 L.Ed. 580, 50 A.L.R. 1.

by each house to protect itself against such other acts of non-members as obstruct or interfere with the proper performance by it of its legislative or other functions. It has been permitted to do so in punishing an attempt to bribe one of its members.⁵⁴ It has the undoubted power to do the same to protect itself from disturbances while in the performance of its functions, or to protect its members in the exercise of their duties. The power may not, however, be exerted to punish a non-member for writing and publishing a letter sent to the chairman of one of its committees in which the actions and purposes of the committee were criticized in an ill-tempered and irritating manner.⁵⁵ The basis of this decision was the Court's view that the letter, though offensive and vexatious, "was not calculated or likely to affect the House in any of its proceedings or in the exercise of any of its functions." It cannot be inferred from this decision that there might not be kinds and degrees of criticism and pressures which would justify a house in resorting to this extreme and extraordinary power, but it is certain that it will require an extreme case before the Court will sustain its exercise thereof. As in the case in which it is invoked in aid of an inquiry in direct aid of the legislative process, the exercise of this auxiliary power for the purposes discussed in this paragraph is the exercise of a legislative, and not a judicial, function.

The primary reason for implying the power of each house to arrest non-members, try them in contempt proceedings, and punish them upon conviction thereof, is to enable each house to remove obstructions to the performance of its duties. It was once thought that it could be exerted only to remove existing obstructions, and that the power to punish ceased upon the removal of that obstruction or as soon as its removal had become impossible. It has, however, been recently decided that the power is not limited by these factors, but that the power to punish for a past contempt is an appropriate means for vindicating the Congressional privilege of requiring the production of evidence when demanded in aid of its legislative function.⁵⁶ The factors referred to above were held to go only to the question

⁵⁴ *Anderson v. Dunn*, 6 Wheat. 204, 5 L.Ed. 242.

⁵⁵ *Marshall v. Gordon*, 243 U.S. 521, 37 S.Ct. 448, 61 L.Ed. 881, L.R.A. 1917F, 279, Ann.Cas.1918B, 371. The contents of the letter were referred to as "slanderous" in *JURNEY v.*

McCRACKEN, 294 U.S. 125, 55 S.Ct. 375, 79 L.Ed. 802, Black's Cas. Constitutional Law, 2d 166.

⁵⁶ *JURNEY v. McCRACKEN*, 294 U.S. 125, 55 S.Ct. 375, 79 L.Ed. 802, Black's Cas. Constitutional Law, 2d 166.

of the guilt of the person charged with the contempt, not to the jurisdiction of the house in question to try him therefor. The decision clearly permits the use of the power for the sole purpose of punishment even though it can have no effect in removing obstructions in the specific case in which it is used for the former purpose.

The Constitution makes each house the judge of the elections, returns, and qualifications of its own members. In making investigations to determine the right of any member to his seat the houses of Congress exercise an auxiliary legislative function conferred upon them by the Constitution. They have in this connection the same kind of power as a court has to compel the attendance of witnesses, including that of attaching a person for the purpose of detaining him as a witness.⁵⁷ They also possess the same kind of powers as a court to enforce their orders by adjudging those who disobey their orders in contempt of their authority and punishing them therefor. As in the case where this latter power is exercised in aid of their legislative functions, the authority to order witnesses to attend may be conferred upon a committee, but the contempt proceedings must be by the respective houses. The Constitution confers upon the Senate the duty of trying impeachments. The Senate is really performing a judicial function in the trial of impeachments. It possesses in this connection the auxiliary judicial powers of summoning witnesses, and of adjudging them in contempt of its authority and punishing them therefor.

The punishment to be inflicted upon the conviction of any person in contempt proceedings instituted by either house of Congress rests within the discretion of the house in which he was convicted. He may be imprisoned, but the term of the imprisonment may not extend beyond the session of the house in which the contempt occurred.⁵⁸ The convicted person frequently institutes habeas corpus proceedings to test the legality of his imprisonment or detention, but the extent of judicial review in such proceedings is the decision of whether the house inflicting the punishment had jurisdiction to make the determination which it made. There has been found no case in which judicial review has extended beyond that issue.

⁵⁷ *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 49 S.Ct. 452, 73 L.Ed. 867.

⁵⁸ *Marshall v. Gordon*, 243 U.S. 521, 37 S.Ct. 448, 61 L.Ed. 881, L.R.A.1917F, 279, Ann.Cas.1918B, 371.

The power of Congress to protect its performance of its various functions is not limited to punishing by contempt proceedings those acts that obstruct or interfere therewith. It may validly declare such acts criminal and punish them accordingly. It has in fact done so by statute enacted in 1857, and this has been sustained as a proper exercise of its legislative powers.⁵⁹ The purpose of this statute has been said to have been to supplement the power of contempt by providing a more drastic punishment for such acts than was possible when the power of contempt was employed to deal therewith.⁶⁰ The enactment of this statute has not impaired the power to resort to contempt proceedings to accomplish the same ultimate objectives.⁶¹ The scope within which its provisions may constitutionally be applied are determined by the same considerations that define the scope of the contempt power.⁶² Conduct not validly punishable by the latter could not validly be made punishable by a statute of this character.⁶³

DEFINING THE SCOPE OF CONGRESSIONAL POWERS

111. The Congress may exercise only those powers that have been delegated to it by the Constitution. The scope of those powers includes that of enacting all laws necessary and proper for carrying into execution the powers expressly conferred upon it, and all other powers vested in the federal government by the Constitution.
112. The powers of Congress are frequently classified into exclusive and concurrent powers. The mere grant to it of the former renders invalid state legislation or other state action

⁵⁹ *In re Chapman*, 166 U.S. 661, 17 S.Ct. 677, 41 L.Ed. 1154.

⁶⁰ *JURNEY v. McCracken*, 294 U.S. 125, 55 S.Ct. 375, 79 L.Ed. 802, Black's Cas. Constitutional Law, 2d 166.

⁶¹ *In re Chapman*, 166 U.S. 661, 17 S.Ct. 677, 41 L.Ed. 1154; *JURNEY v. McCracken*, 294 U.S. 125, 55 S.Ct. 375, 79 L.Ed. 802, Black's Cas. Constitutional Law, 2d 166.

⁶² *Sinclair v. United States*, 279 U.S. 263, 49 S.Ct. 268, 73 L.Ed. 692.

⁶³ The houses of the legislatures of the several states have a power of contempt similar to that possessed by the houses of Congress, exercisable in general on the same theory and within the same limitations as is the similar power of the houses of Congress; *People ex rel. McDonald v. Keeler*, 99 N.Y. 463, 2 N.E. 615, 52 Am.Rep. 49; *Greenfield v. Russel*, 292 Ill. 392, 127 N.E. 102, 9 A.L.R. 1334.

within the field of operation of such federal power. The mere grant to it of concurrent powers has no such effect. No state action in conflict with valid exercises of its powers by Congress may be enforced while the conflict endures.

113. A power vested in Congress is deemed an exclusive power if it is made so by the express language of the Constitution, if the Constitution expressly prohibits the exercise by a state of a power conferred by it upon the Congress, or if the possession by the states of a similar power would be inconsistent with its exercise by the Congress.

The problem of determining the specific legislation that Congress may enact under the grant to it of the legislative power of the United States is in legal theory that of construing the language in which the grant has been made. The basic reason for this is to be found in the fundamental legal theory on which the federal Constitution is constructed. It is the legal source not only of the powers exercisable by the federal government but also of those exercisable by the several states. The framers of the Constitution might have given it a form in which the powers to be exercised by the states were enumerated with a reservation to the federal government of all the governmental powers of the people of the United States other than those contained in that enumeration. That was not, however, the method adopted. It was the powers to be exercised by the federal government that were enumerated and specified, with the state powers given by implication a residual character although some powers that might have been contained in that residue were specifically denied the states. This implication was made express by the provisions of the Tenth Amendment. The powers of both the federal government and the states under the federal Constitution are thus delegated powers in the sense that they have been conferred upon them by the people of the United States through the federal Constitution.⁶⁴ The mere fact that

⁶⁴ It should be stated at this point that the governmental powers which the federal Constitution permits a state to exercise are distributed by its own constitution among the various governmental organs composing its government. Those organs are universally provided for in state constitutions. It is not customary for a state constitution to attempt an exhaustive enumeration of the pow-

ers conferred upon each of its governmental organs or departments. There is no need for such enumeration or specification since the problem of a division of a state's governmental power with another sovereign or quasi-sovereign does not arise. A state constitution is, however, a grant of powers to the organs of government established by it so far as it defines the scope of

federal powers are delegated powers furnishes no adequate basis from which to deduce the principles to be employed in construing the scope of those powers. The specific form which a question as to the scope of those powers assumes is due to the fact that the Constitution has adopted the method of enumerating and specifying the powers of the federal government rather than defining them as the residue of the governmental powers of the people of the United States not delegated to the states by an enumeration and specification contained in the Constitution. The answer to a question whether a particular exercise of federal governmental power is constitutional thus depends on the possibility of deriving it by recognized processes of interpretation from one or more of the express provisions of the Constitution granting that government its powers. This is true of all the departments of that government. It is, however, under no greater compulsion than the states to find the basis for its action in the federal Constitution. There is merely a difference between them in respect of the technique employed in determining whether their specific acts are within the respective delegations of power made to them by that Constitution. The method indicated above is that employed when the issue is one of federal power; that used when the issue is as to a state's power is more complex and will be later considered.

All federal powers are in the final analysis express powers. This means that the federal government must base its specific acts upon some one or more of the express provisions of the Constitution. This is as true of its legislative as of its other powers. The doctrine that there exist implied legislative powers means only that the scope of those expressly granted includes authority to enact not only the legislation clearly indicated by the language in which the powers are conferred but also all laws that constitute appropriate means adapted to carrying into execution the expressly granted powers and to realizing the objectives for which they were granted or which lie within the legitimate sphere of federal competence. This doctrine itself rests on the express constitutional provision conferring upon Congress the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer

their powers. Those governmental organs, therefore, exercise delegated powers only.

thereof.”⁶⁵ There is no precise method for determining in every instance whether particular legislation meets the standard that defines what means are appropriate and what constitute the legitimate ends for which the expressly granted legislative and other powers may be exercised. The decisions of the Supreme Court on the former of these issues show periodic fluctuations between a broad and narrow interpretation of the “necessary and proper” clause. They also reveal a measure of inconsistency in the tests applied for determining whether the objectives aimed at by particular legislation are among the “legitimate ends” for which federal powers may be exercised. This has been particularly true when federal powers have been employed in such manner as to result in a regulation of matters whose regulation was alleged to be within the exclusive competence of the states. The general phases of this matter were considered in discussing the constitutionally established division of powers between the federal government and the states.⁶⁶ The problem in relation to particular federal powers will be considered in discussing those powers.

The purpose of those provisions of the federal Constitution that confer powers upon the several departments of the federal government was the definition of the respective spheres of governmental authority of both it and the states. The necessary result of the establishment of the federal government with a defined field of governmental power was the reduction of the sphere of state action. The principal problem has been to define the principles that determine the extent of that diminution of state power. It is in connection with that problem that there has been developed a classification of federal legislative powers into exclusive and concurrent powers. The general aspects of this matter have already been discussed,⁶⁷ and the problem in connection with particular federal powers will be considered in dealing with those powers. A summary only is required at this point. The valid exercise by Congress of any of its powers ren-

⁶⁵ U.S.C.A.Const., Art. 1, Section 8. *McCULLOCH v. MARYLAND*, 4 Wheat. 316, 4 L.Ed. 579, Black's Cas. Constitutional Law, 2d 172. See discussion in *Ruppert v. Caffey*, 251 U.S. 264, 40 S.Ct. 141, 64 L.Ed. 260, in which Mr. Justice Brandeis suggests that the classification of federal legislative powers into “ex-

press” and “implied” has produced a degree of confusion that might have been in part avoided if they had been divided into “specific” and “general” powers.

⁶⁶ See Chapter 4, Sections 63-70.

⁶⁷ See Chapter 4, Sections 66-70.

ders unenforcible all state legislation or other state action in conflict therewith, regardless of whether the federal power be an exclusive or a concurrent power. The distinction between these two classes of powers is important only when the issue is whether the mere grant of a power to Congress bars a state from exercising legislative or other powers in a given field or in a particular manner. The mere grant of an exclusive power has that effect even prior to any exercise thereof by Congress. The power to establish a uniform rule of naturalization may be taken as an example of an exclusive power.⁶⁸ The grant itself prevents a state from enacting any legislation for conferring federal citizenship upon aliens. The exclusiveness of the power means no more than that. Neither its grant, nor its exercise, would prevent a state from enacting and enforcing laws for conferring state citizenship upon aliens. The mere grant of a concurrent power to Congress does not prevent a state from enacting and enforcing legislation dealing with matters that could be dealt with by Congress under such concurrent power. The power of Congress to establish uniform laws on the subject of bankruptcy throughout the United States may be taken as an example of a concurrent power. The mere grant thereof does not prevent the enactment and enforcement of state insolvency laws effective within the state's territorial limits.⁶⁹ It has been held that Congress may restrict state action within the field over which Congress could legislate under one of these concurrent powers by evidencing its intent to do so either by affirmative action or by its silence.⁷⁰ The silence of Congress has that effect only if the state legislation relates to a subject matter requiring uniform national treatment, and the arguments relied upon to sustain that position justify the view that such a concurrent power is to that extent an exclusive power.⁷¹ The same power may thus be in part exclusive and in part concurrent. The commerce power has given rise to this issue more frequently than has any other. The importance of the distinc-

⁶⁸ *Chirac v. Chirac*, 2 Wheat. 259, 4 L.Ed. 234.

⁶⁹ *STURGES v. CROWNINSHIELD*, 4 Wheat. 122, 4 L.Ed. 529, Black's Cas. Constitutional Law, 2d 181.

⁷⁰ *Cooley v. Board of Wardens of Port of Philadelphia* use of Society for Relief of D. P., 12 How. 299, 13

L.Ed. 996; *Bowman v. Chicago & N. W. Ry. Co.*, 125 U.S. 465, 8 S.Ct. 689, 1062, 31 L.Ed. 700.

⁷¹ *Leisy v. Hardin*, 135 U.S. 100, 10 S.Ct. 681, 34 L.Ed. 128; *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U.S. 311, 37 S.Ct. 180, 61 L.Ed. 326, L.R.A.1917B, 1218, Ann. Cas.1917B, 845.

tion between exclusive and concurrent powers as an aid in the solution of an issue as to the effect of a grant of federal powers upon the scope of a state's governmental powers has been over-emphasized, but continues to be employed in that connection.

The Constitution itself in most cases does not expressly indicate which powers of Congress are exclusive and which are concurrent. The express denial to a state of a power conferred upon Congress necessarily makes it an exclusive power. The power of Congress to coin money is an example of such an exclusive power. A power whose exercise by the states is not expressly prohibited is held to be exclusive only if the express language in which it is granted makes it such, or if its character is such that the possession of a similar power by the states would be incompatible with its grant to the Congress. The power to borrow money on the credit of the United States, and that of establishing a uniform rule of naturalization, are examples of powers whose exclusive character rests on such basis. In the subsequent discussion the scope of an express prohibition upon a state's exercise of a power conferred upon the Congress will be considered in discussing the particular federal power intended to be protected by such prohibition.

CHAPTER 7

FEDERAL TAXING AND OTHER FISCAL POWERS

- 114. General Considerations.
- 115. Purposes for which Taxing Power May Be Used.
- 116-118. Use of Taxation for Regulatory Purposes.
- 119. Direct Taxes.
- 120. Indirect Taxes.
- 121-125. Income Taxes.
- 126. Export Duties and Port Preferences.
- 127. Taxation of Federal Judicial, and Presidential, Salaries.
- 128-130. Federal Tax Power and Due Process.
- 131-134. Other Fiscal Powers.

GENERAL CONSIDERATIONS

214. The Constitution confers upon Congress the sole power to lay and collect taxes, duties, imposts and excises, and imposes certain specific and general limitations upon its exercise thereof.

The power of taxation has always been deemed a legislative power under our theories of government. This does not mean that every step in the process by which the amount of tax due from any taxable is determined is legislative in character. The assessment of that liability is an administrative process even when the precise amount is legislatively fixed. The statement that taxation is a legislative power means that it is the function of the legislature to determine that a tax shall be levied, to select the subjects that are to be taxed, and to define the principles to be employed in computing the amount due from each taxable. The federal Constitution is thus in strict accord with our fundamental political theories in conferring upon the Congress the power to "lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States."¹ The power was, however, subjected to several important express limitations, and further limitations thereon have been judicially developed on the basis of several constitutional provisions not specifically directed at that objective. The present chapter will discuss the ex-

¹ U.S.C.A. Const. Art. 1, Sec. 8,
Clause 1.

tent of this power as affected by both these specific and general limitations.

PURPOSES FOR WHICH TAXING POWER MAY BE USED

115. The taxing power may be used only to pay the debts and provide for the common defense and general welfare of the United States, and the power to expend the revenues derived from its exercises is similarly limited.

General Considerations

The principal reason for conferring the taxing power upon any government is to enable it to procure revenues for defraying the costs incurred by it in exercising its powers and performing its functions without bankrupting itself or saving itself therefrom by the expedient of manipulating its monetary system. The ultimate protection of the taxpayer against an excessive tax burden is political action, but some degree of protection is afforded him within the limits of our existing constitutional system by specific or general restrictions upon the purposes for which taxes may be levied. The requirement that state taxes be for a public purpose has been derived from the due process clause of the Fourteenth Amendment. The due process clause of the Fifth Amendment, which is a limit on the federal government, has thus far not been construed to impose a comparable restriction upon the federal taxing power. Nor is it likely that it will ever receive such construction in view of the specific provision of the taxing clause which indicates the purposes for which the power may be used. That provision permits taxes to be levied either to pay the debts or to provide for the common defence and general welfare of the United States. The issue whether taxes have been levied for a permissible federal purpose, however it may arise, cannot be determined without a consideration of the purposes for which their proceeds are authorized to be expended. The power to appropriate moneys raised by taxation is as broad as, but no broader than, the power to tax.² Such moneys may, therefore, be expended only for those purposes specified in the provision conferring the taxing power. It is this that permits the validity of a tax from this point of view to be determined by considering the purposes for which its proceeds are authorized

² *United States v. Butler*, 297 U.S. 1, 56 S.Ct. 312, 80 L.Ed. 477, 102 A.L.R. 914.

to be expended. The right of the taxpayer to a judicial determination of the issue has been recognized at least under some circumstances. He has that right when the proceeds of the tax imposed upon him are definitely earmarked for use to finance the contested purpose,³ and he has been permitted to do so even where this was not the case⁴ despite the fact that some of the reasons on which the decision in *Frothingham v. Mellon*⁵ was based appear to be inconsistent therewith.

Payment of Debts of the United States

The question whether a tax is imposed for a permissible purpose is primarily for the decision of Congress, and the courts will set aside its conclusions in that matter only in case the abuse of its discretion is very clear.⁶ There have been comparatively few important decisions on what constitute the legitimate purposes for which the federal taxing power may be exercised. It may be used to defray the costs incurred by the federal government and any of its agencies and instrumentalities in carrying on the functions conferred upon them by, or under the authority of, the Constitution. The question of what constitute debts of the United States for whose discharge taxes may be levied has received some judicial discussion. The term "debts" is not limited to those evidenced by some written obligation, nor to those of a strictly legal character which would be recoverable in a court of law. It includes claims based on general principles of right and justice, or upon such moral considerations as would bind the conscience or honor of an individual even though not cognizable by a court.⁷ It is for Congress to determine in the first instance whether a national moral obligation shall be recognized, and its decision on this matter of policy is open to judicial review only in cases of a clear abuse of its discretion.⁸ It

³ *United States v. Butler*, 297 U.S. 1, 56 S.Ct. 312, 80 L.Ed. 477, 102 A.L.R. 914; *CINCINNATI SOAP CO. v. UNITED STATES*, 301 U.S. 308, 57 S.Ct. 764, 81 L.Ed. 1122, *Black's Cas. Constitutional Law*, 2d, 189.

⁴ *CHAS. C. STEWARD MACHINE CO. v. DAVIS*, 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279, 109 A.L.R. 1293, *Black's Cas. Constitutional Law*, 2d, 195; *Helvering v. Davis*, 301 U.S. 619, 57 S.Ct. 904, 81 L.Ed. 1307, 109 A.L.R. 1319.

⁵ 262 U.S. 447, 43 S.Ct. 597, 67 L. Ed. 1073. See Chapter 22, Sections 22-26.

⁶ *CINCINNATI SOAP CO. v. UNITED STATES*, 301 U.S. 308, 57 S.Ct. 764, 81 L.Ed. 1122, *Black's Cas. Constitutional Law*, 2d, 189.

⁷ *United States v. Realty Co.*, 163 U.S. 427, 16 S.Ct. 1120, 41 L.Ed. 215.

⁸ *CINCINNATI SOAP CO. v. UNITED STATES*, 301 U.S. 308, 57 S.Ct.

has, accordingly, been held proper to appropriate tax revenues to pay producers of sugar a bounty promised them under an act of Congress which, for the purposes of the decision, was assumed to have been unconstitutional. This was on the theory that the conduct of the producers in reliance upon that statute constituted a sufficient basis for a moral obligation which Congress might validly recognize and discharge.⁹ The moral obligation of the United States to protect, defend, and provide for the general welfare of the inhabitants of the Philippine Islands, a dependency of the United States, constitutes a "debt" as that term is used in the taxing provision of the Constitution. A tax imposed on domestic processors of cocoanut oil of Philippine origin whose proceeds were specifically earmarked for transfer to the Treasury of the Philippine Islands is, therefore, levied for a permissible purpose. Nor is it made invalid by a requirement conditioning the appropriation on the government of those Islands not granting an offsetting subsidy to the producers of such oil, since the only purpose of imposing the condition is to insure that the purpose of the tax to protect certain domestic producers will not be defeated.¹⁰ The broad and liberal construction of this term thus far adopted by the Supreme Court rests on a sound recognition of the degree to which judicial review of this matter inevitably involves the courts in questions of policy. They cannot completely avoid this if this constitutional limit is to be judicially enforced, but their reluctance to interpose is intelligible in the light of the character of the constitutional problem involved.

Provision for the General Welfare of the United States

The provision that the taxing power may be used to provide for the general welfare of the United States has recently become the subject of considerable judicial discussion. The attempt to give that "general welfare" provision the status of an independent power under which the Congress would be permitted to enact any character of legislation to provide for the general welfare of the United States has been explicitly repudiated.¹¹ It is merely a specification of one of the purposes for which Congress may

764, 81 L.Ed. 1122, Black's Cas. Constitutional Law, 2d, 189.

⁹ United States v. Realty Co., 163 U.S. 427, 16 S.Ct. 1120, 41 L.Ed. 215.

¹⁰ CINCINNATI SOAP CO. v.

UNITED STATES, 301 U.S. 308, 57 S. Ct. 764, 81 L.Ed. 1122, Black's Cas. Constitutional Law, 2d, 189.

¹¹ United States v. Butler, 297 U. S. 1, 56 S.Ct. 312, 80 L.Ed. 477, 102 A.L.R. 914.

lay and collect taxes and for which it may appropriate the moneys raised by taxation, and constitutes a limitation thereon.¹² This, however, did not dispose of the problem of defining the scope of that limitation, and thereby of that of determining the extent of the taxing and spending powers of Congress so far as that depends upon the purposes that may be realized thereby. The principal issue has been whether the use thereof by Congress was limited to financing the promotion of that general welfare so far as it could be independently promoted through the exercise of its other powers or whether the taxing and spending powers could themselves be used to provide and promote it. The definitive answer thereto has recently been given in favor of the latter of these alternatives. It has been held that the limits on the taxing power are set by the clause that confers it and not by those that confer and define the other legislative powers of Congress.¹³ The acceptance of this view has raised its own problems of which the definition of the concept "the general welfare of the United States" is but one. The necessity for distinguishing between what is described as "particular welfare" and "general welfare" has been judicially recognized. As in the case of what constitute "debts" for whose discharge the taxing power may be validly used, the discretion as to where the line between these two classes of "welfare" is to be drawn belongs primarily to Congress, and judicial interference therewith is justified only if its "choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." Those who assail its action must, to prevail, show that "by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to Congress."¹⁴ A tax imposed for the purpose of, and as an integral part of a plan for, providing a system of unemployment insurance is valid as one to provide for the general welfare of the United States,¹⁵ as is a tax levied as part of a plan for creating a fund from which to pay old age pensions under

¹² *United States v. Butler*, 297 U.S. 1, 56 S.Ct. 312, 80 L.Ed. 477, 102 A.L.R. 914.

¹³ *United States v. Butler*, 297 U.S. 1, 56 S.Ct. 312, 80 L.Ed. 477, 102 A.L.R. 914. For a discussion of the conflicting views on this issue entertained by Madison, Hamilton, Monroe and Story see also *Kansas Gas & Electric*

Co. v. Independence, 10 Cir., 79 F.2d 32.

¹⁴ *Helvering v. Davis*, 301 U.S. 619, 57 S.Ct. 904, 81 L.Ed. 1307, 109 A.L.R. 1319.

¹⁵ *CHAS. C. STEWARD MACHINE CO. v. DAVIS*, 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279, 109 A.L.R. 1293, *Black's Cas. Constitutional Law*, 2d, 195.

a national plan.¹⁶ Lower federal courts have either held or stated that grants or loans of federal funds to municipalities for the construction of municipal public works were a proper use of such funds to provide for the general welfare by relieving unemployment during a period of serious economic depression.¹⁷ They have also held that the powers to tax, borrow and appropriate permitted the creation of a governmentally owned corporation authorized to use federal funds to assist in refinancing the private debt structure throughout the nation on the theory that the national welfare would be promoted thereby.¹⁸ There is as yet no indication of the probable limits to this doctrine that the taxing and spending powers of Congress may be used to provide for the national welfare other than those implicit in the requirement that the welfare to be promoted must be national and not local, and that applied in *United States v. Butler*.¹⁹

USE OF TAXATION FOR REGULATORY PURPOSES

116. The Congress may not use its power to levy taxes for the primary purpose of regulating a matter whose regulation lies within the exclusive competence of the states.
117. The mere fact that Congress may have had an incidental motive in levying the tax other than the raising of revenue does not invalidate it if its primary purpose was the raising of revenue.
118. The power of Congress to spend the revenues raised by taxation is subject to the same limitations with respect to the purposes for which they may be appropriated as those imposed upon its power to levy taxes.

Use of Federal Taxing Power for Purposes of Regulation

The limitation on the use of Congress' spending power applied in the case just mentioned²⁰ involves the application to it of a restriction that had been previously imposed upon the power

¹⁶ *Helvering v. Davis*, 301 U.S. 619, 57 S.Ct. 904, 81 L.Ed. 1307, 109 A.L.R. 1319.

¹⁷ *Duke Power Co. v. Greenwood*, 4 Cir., 91 F.2d 665; *Kansas Gas & Electric Co. v. Independence*, 10 Cir., 79 F.2d 32. Cf. *Franklin Township v. Tugwell*, 66 App.D.C. 42, 85 F.2d 208.

¹⁸ *United States v. Kay*, 2 Cir., 89 F.2d 19.

¹⁹ 297 U.S. 1, 56 S.Ct. 312, 80 L.Ed. 477, 102 A.L.R. 914.

²⁰ 297 U.S. 1, 56 S.Ct. 312, 80 L.Ed. 477, 102 A.L.R. 914.

to levy taxes. The imposition of taxes inevitably involves consequences among which may be included important regulatory effects upon the activities burdened by those taxes and even upon those not so burdened. The occurrence of those consequences does not depend upon whether or not the legislature intended them. This correlation between taxation and the regulatory effects thereof makes possible a use of Congress' power to levy taxes as an instrument of regulation. Its exercise of the taxing power is not made invalid merely because it entails regulatory results that it could not validly effect through an exercise of its other legislative powers,²¹ or because the activity taxed is one that a state may regulate under its police power.²² Any other principle would too seriously cripple its use of the taxing power for revenue purposes. The courts have, however, recognized that the definition of what is within that power cannot wholly ignore the inevitable relation between taxation and regulation lest the power become the instrument for federal regulation of matters and activities that Congress could not otherwise control and whose regulation lies within the exclusive power of the states. The decision as to whether that which is in form an exercise of the taxing power is in law a tax or a disguised attempt at regulation is deemed a judicial question. It arises with respect to acts of Congress only if the matter or activity regulated is one that it cannot directly regulate under its other legislative powers. If the matter or activity is one that it can directly regulate, then it may use its taxing power for that purpose.²³ The answer depends upon what is the primary purpose for which the pecuniary demand is imposed. If that be the raising of revenue, the law imposes a tax and is a valid exercise of the taxing power;

²¹ In re Kollock, 165 U.S. 526, 17 S. Ct. 444, 41 L.Ed. 813.

²² License Tax Cases, 5 Wall. 462, 18 L.Ed. 497.

²³ It is immaterial in connection with the present problem whether this be treated as a valid exercise of the taxing power in which case the financial exaction would be deemed a tax, or as an exercise of some power of regulation possessed by Congress in which case the financial exaction would be deemed a penalty. This issue might under certain circumstances arise under the ex post

facto clause of U.S.C.A. Constitution, Article 1, Section 9, and others of the existing constitutional limitations. In *CHILD LABOR CASES, BAILEY v. DREXEL FURNITURE CO.*, 259 U.S. 20, 42 S.Ct. 449, 66 L. Ed. 817, 21 A.L.R. 1432, Black's Cas. Constitutional Law, 2d, 183, the Court stated: "Where the sovereign enacting the law has power to impose both tax and penalty, the difference between revenue production and mere regulation may be immaterial, but not so when one sovereign can impose a tax only, and the power of regulation rests in another."

if that be regulation, the law is deemed to impose a penalty upon the conduct that conditions the accrual of the liability for its payment, and to constitute an invalid regulation of such conduct.²⁴ The mere fact that Congress may have had an incidental motive other than raising revenue is immaterial if revenue was its primary purpose in imposing a financial exaction.²⁵ The character of the test renders complete consistency in its application improbable, and the decisions reflect that fact. Some of the more important of these will now be briefly noted.

The promotion of non-revenue objectives is often indicated by what is selected for taxation, by the amount of the tax, by a discriminatory use of the taxing power, or by the factors that condition the accrual of the liability for the financial demand. The levy of import duties for the purpose of protecting domestic producers of competing goods was the earliest use of the taxing power with what has been assumed to be an incidental motive other than revenue. It has been sustained by an argument relying heavily upon the doctrine of contemporaneous construction, although the Court did state that "So long as the motive of Congress and the effect of its legislative action are to secure revenue for the benefit of the general government, the existence of other motives in the selection of the subject of taxes cannot invalidate congressional action."²⁶ The same type of selection of tax subject, combined with a system of rates discriminating against the subject whose use Congress intended to discourage or even prohibit, was employed to tax state bank notes out of existence and to give certain dairy interests a competitive advantage over vendors of colored oleomargarine. The taxes were sustained in both instances, the Court reaffirming its view that the incidental presence of an ulterior motive to regulate the matters involved did not invalidate them.²⁷ There have been other

²⁴ *BAILEY v. DREXEL FURNITURE CO.*, 259 U.S. 20, 42 S.Ct. 449, 66 L.Ed. 817, 21 A.L.R. 1432, Black's Cas. Constitutional Law, 2d, 183.

²⁵ *BAILEY v. DREXEL FURNITURE CO.*, 259 U.S. 20, 42 S.Ct. 449, 66 L.Ed. 817, 21 A.L.R. 1432, Black's Cas. Constitutional Law, 2d, 183.

²⁶ *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 48 S.Ct. 348, 72 L.Ed. 624. The levy of import duties, including those that are

completely prohibitive, can be justified as an exercise of the power of Congress to regulate foreign commerce.

²⁷ *Veazie Bank v. Fenno*, 8 Wall. 533, 19 L.Ed. 482 (discriminatory tax against circulating notes of state banks held valid); *McCray v. United States*, 195 U.S. 27, 24 S.Ct. 769, 49 L.Ed. 78, 1 Ann.Cas. 561 (discriminatory tax against sale of colored oleomargarine held valid). The decision in the former of these cases

instances in which the undoubted presence of a motive to restrict activities that the federal government could not directly control through its other powers has been held not to invalidate taxes that produced some revenue. These include decisions sustaining a burdensome license tax upon dealers in firearms of the kind usually used by gangsters,²⁸ and holding valid an excise on the sale of theatre tickets by ticket brokers which was progressively graduated on the basis of the excess of the prices charged by them over the box-office prices.²⁹ There are, however, many decisions in which the ulterior motive was deemed so to predominate over the revenue motive as to transform that which purported to be a tax into a penalty for violating a regulatory statute beyond the powers of Congress to enact. The imposition of prohibitive taxes on transactions on commodity markets as an integral part of an elaborate system for the regulation of commodity exchanges has been held invalid.³⁰ The factors relied upon by the Court to support its decisions included the clear evidence of an intention to regulate found in the title of the statute, the prohibitive character of the taxes, the consequent impossibility of raising any revenues thereby, and the intimate relation of the taxing provisions to the unlawful scheme of regulation.³¹ The imposition may be held a penalty because the terms on which liability for it accrues show clearly that its purpose was not revenue but to exert pressure to induce compliance with a system of regulating matters beyond the control of Congress. The most noted instance of this type is the Child Labor Tax Case.³² The same factor contributed to a decision holding invalid a federal excise on retail selling of liquors in violation of the laws of the state in which the business was being conducted.³³ The invalid purpose has been inferred from what was in substance a provision relieving from the tax those who would

rested in part upon other federal powers so that the use of the taxing power was really in aid of the execution of those other powers.

²⁸ *Sonzinsky v. United States*, 300 U.S. 506, 57 S.Ct. 554, 81 L.Ed. 772.

²⁹ *A. Couthoui, Inc. v. United States*, Ct.Cl., 54 F.2d 158, certiorari denied 285 U.S. 548, 52 S.Ct. 396, 76 L.Ed. 939.

³⁰ *Hill v. Wallace*, 259 U.S. 44, 42 S.Ct. 453, 66 L.Ed. 822; *Trusler v.*

Crooks, 269 U.S. 475, 46 S.Ct. 165, 70 L.Ed. 365.

³¹ *Trusler v. Crooks*, 269 U.S. 475, 46 S.Ct. 165, 70 L.Ed. 365.

³² 259 U.S. 20, 42 S.Ct. 449, 66 L. Ed. 817, 21 A.L.R. 1432, *Black's Cas. Constitutional Law*, 2d, 183. See also *Carter v. Carter Coal Co.*, 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160.

³³ *United States v. Constantine*, 296 U.S. 287, 56 S.Ct. 223, 80 L.Ed. 233.

co-operate in carrying out an unconstitutional federal scheme for the regulation of agricultural production.³⁴ In most of these cases the conclusion that the nominal tax was in fact intended to be a penalty for refusal to submit to an invalid system of federal regulation was deemed to be apparent from the terms of the statute taken as a whole. The particular factors employed in drawing that inference varied from case to case, but the ultimate principle was the same.

The case in which the "tax", as an integral part of a system of regulation, is employed as a pressure device for making that system effective, is distinguished from that in which the system of regulations is used as a device for the collection of a valid tax. It is on that basis that the Supreme Court has sustained the elaborate system of regulations embodied in the Harrison Anti-Narcotic Act of 1914. The undoubted purpose of most of these regulations is to secure an effective control of the traffic in narcotics for other than revenue purposes. Those that have thus far been before the Supreme Court have, however, been sustained as reasonable aids in the enforcement of the license tax imposed by that Act and thus to have a definite relation to the raising of revenue. They have been held to have a reasonable tendency to keep the traffic in narcotics above board and open to the inspection of the tax officials, and thus to aid in the prevention of evasions of the tax.³⁵ The theory on which these decisions proceed implies that regulations that could not be justified on that basis would constitute invalid exercises of the taxing power, and that, if all of them should in any case be of that character, the "tax" would be deemed a penalty for the enforcement of such regulations and invalid unless the matter was regulable by Congress in the exercise of its other legislative powers.

Limitations on Federal Spending Powers

It was against this doctrinal background that the case of *United States v. Butler* came before the Supreme Court.³⁶ The reg-

³⁴ *Penn v. Glenn*, D.C., 10 F.Supp. 483; *Robertson v. Taylor*, 4 Cir., 90 F.2d 812; *Glenn v. Smith*, 6 Cir., 91 F.2d 447.

³⁵ *United States v. Doremus*, 249 U.S. 86, 39 S.Ct. 214, 63 L.Ed. 493. The subsequent history of the controversy as to the validity of this statute can be traced through the

following decisions: *Linder v. United States*, 268 U.S. 5, 45 S.Ct. 446, 69 L.Ed. 819, 39 A.L.R. 229; *United States v. Daugherty*, 269 U.S. 360, 46 S.Ct. 156, 70 L.Ed. 309, 310; *Nigro v. United States*, 276 U.S. 332, 48 S.Ct. 388, 72 L.Ed. 600.

³⁶ 297 U.S. 1, 56 S.Ct. 312, 80 L. Ed. 477, 102 A.L.R. 914.

ulatory effects aimed at by the law involved therein were to be secured not through the imposition of the "tax" but through the expenditure of its proceeds. These were specifically devoted to making benefit payments to those producers of certain agricultural commodities who would contract with the United States to reduce their production in accordance with a federally initiated and controlled scheme for the regulation thereof. The majority of the Court held that the regulation of agricultural production was a matter reserved to the states and beyond the legislative powers of Congress, that the latter might not evade the limitation on its powers and indirectly control that production by the use of its taxing and spending powers to purchase the consent of the producers thereto, that the system of contracts and benefit payments constituted an invalid use of the power to appropriate funds raised by taxation, and that the tax itself was invalid as an integral part of an invalid scheme for the regulation of agricultural production.³⁷ A similar, but not identical, issue came before the Court in the Social Security Tax Cases.³⁸ The mere imposition of these taxes, and the use of federal funds irrespective of their source, for the purposes of unemployment insurance and old age pensions was held a valid use of federal powers to provide for the general welfare and to involve no invasion of the constitutional sphere of state functions. It was also held that the provision permitting a credit against the federal taxes on account of taxes imposed in connection with similar state systems involved no coercion of either the taxpayer or the states although it might aid in inducing states to adopt similar systems, and that, therefore, the federal laws and the taxes that constituted integral parts thereof involved no invasion of the powers reserved to the states by the Tenth Amendment. The Butler Case was distinguished on the score that the

³⁷ The dissenting opinion (apart from its criticisms of the general theory and specific arguments of the prevailing opinion) took the position that the power to tax, and to appropriate tax revenues, for the general welfare is not limited to accomplishing those objectives that can be directly effected through the use of Congress' other legislative powers (a position also taken by the majority), that the validity of an expenditure of such funds does not depend on not using them to induce action

which Congress could not command, and that the limitation imposed thereon by the majority is destructive of its use to provide for the general welfare of the United States.

³⁸ CHAS. C. STEWARD MACHINE CO. v. DAVIS, 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279, 109 A.L.R. 1293, Black's Cas. Constitutional Law, 2d, 195; Helvering v. Davis, 301 U.S. 619, 57 S.Ct. 904, 81 L.Ed. 1307, 109 A.L.R. 1319.

condition on which the allowance of the credit was dependent (i. e., the enactment of similar state systems and taxes) was not directed towards the attainment of an unlawful end but towards the achievement of an end within the federal taxing power and for whose realization nation and state might lawfully co-operate.³⁹ The net result of the Butler and Social Security Tax Cases seems to be that the federal taxing and spending powers may be used to induce private persons and states to co-operate with the national government to realize any objectives for which federal powers, including the taxing power, may be exercised, but that the preservation of the states as independent units in the constitutional system of the United States is a limiting factor in the definition of those objectives. This principle is admittedly vague, but the obscurities of the decisions from which it is derived do not permit its formulation in more precise and specific terms.⁴⁰

DIRECT TAXES

- 119. The Constitution requires direct taxes to be apportioned among the states on the basis of their respective populations as determined by the census for which the Constitution makes provision.**

The Constitution divides the taxes that the Congress may levy throughout the United States into two principal classes as follows: (a) capitation and direct taxes, and (b) duties, imposts and excises. It has been stated that these classes "include every form of tax appropriate to sovereignty."⁴¹ The only reason for

³⁹ The Court, in CHAS. C. STEWARD MACHINE CO. v. DAVIS, expressly states that it is not deciding that a tax is valid "when imposed by act of Congress, if it is laid upon the condition that a state may escape its operation through the adoption of a statute unrelated in subject matter to activities fairly within the scope of national policy and power. No such question is before us."

⁴⁰ In connection with the expenditure of federal funds attention should be directed to U.S.C.A. Constitution, Article 1, Section 9, Clause 7, which provides that "No money

shall be drawn from the treasury, but in consequence of appropriations made by law." It has been held that that is merely a restriction on the disbursing authority of the executive department: CINCINNATI SOAP CO. v. UNITED STATES, 301 U.S. 308, 57 S.Ct. 764, 81 L.Ed. 1122, Black's Cas. Constitutional Law, 2d, 189.

⁴¹ CHAS. C. STEWARD MACHINE CO. v. DAVIS, 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279, 109 A.L.R. 1293, Black's Cas. Constitutional Law, 2d, 195.

determining whether a given tax belongs to the one or the other of these classes is that their levy is subject to different constitutional rules. The former, with which the present discussion is concerned, are required to be apportioned among the states on the basis of their respective populations as determined by the census for which the Constitution provides.⁴² The levy of a tax is impossible without some provision for its apportionment among the taxables upon which it is imposed. It is not, however, that apportionment with which the foregoing constitutional provisions are concerned. They deal with an apportionment not among the taxables but among the states. An example will make plain the difference between these two types of apportionment. A tax on real estate has always been admitted to be a direct tax in the constitutional sense. Such taxes are generally apportioned among the taxable units of real property on the basis of their relative values. The requirement that a federal real estate tax be apportioned among the states on the basis of their respective populations would involve a preliminary allocation of the total to be raised by a federal tax of this kind among the states on a population basis. There would then have to be a definition of the principles in accordance with which the amount allocated to each state would be spread over the various units of taxable real estate within each state. It is apparent that the tax rates in the several states would vary inversely to their respective per capita real estate wealth, and also to their respective per capita total wealth so far as that varied directly with the per capita real estate wealth. It is that consequence of the constitutional rule of apportionment that has made resort to direct federal taxes extremely rare.

The contention that particular federal taxes were direct and invalid for want of the requisite apportionment has been often made but seldom sustained. There has from the first been unanimity of judicial opinion that capitation taxes and taxes on real estate were such.⁴³ There have, however, been wide differences of opinion as to the principles determining what other forms of taxes were such. It was once definitely affirmed that the two taxes above mentioned exhausted the class of di-

⁴² U.S.C.A.Const. Art. 1, Sections 2 and 9.

556, and *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 15 S.Ct. 673, 39 L.Ed. 759, and *Id.*, 158 U.S. 601, 15 S.Ct. 912, 39 L.Ed. 1108.

⁴³ See discussions in *Hylton v. United States*, 3 Dall. 171, 1 L.Ed.

rect taxes.⁴⁴ This position was as definitely rejected in the Pollock Cases which held that the class included in addition thereto taxes on personal property and on the income from both real and personal property.⁴⁵ The view now accepted recognizes that the proper method for determining the issue is by discovering what taxes were considered direct at the time of the adoption of the Constitution. In the meantime the view presently followed by the courts is that the class of direct taxes includes all taxes on property, real or personal, and on persons because of, or with respect to, their ownership thereof.⁴⁶ It is unlikely that any additions will be made to the class, but it cannot be correctly asserted that the possibility thereof has been completely and finally foreclosed. The problem has thus become that of determining when a tax is imposed on property, or on persons because of and with respect to their ownership thereof. A tax on the accumulated value of a shareholder's interest in the corporate surplus, even though payable only at the time of its "distribution" to him by way of a stock dividend, is in substance on property and a direct tax. The attempt of the United States to sustain the inclusion of stock dividends in the income taxable under the Sixteenth Amendment on this theory was accordingly rejected.⁴⁷ A tax upon a particular use of property, or upon the exercise of a single power over property incidental to its ownership, is not such a tax.⁴⁸ It remains undecided whether the limitation on the levy of direct taxes would be deemed invalidly circumvented by a series of taxes separately imposed upon a majority or all of the uses of property, or upon the exercise of a majority or all of the powers incidental to its ownership, or by a tax upon the exercise of a single power indispensable to the enjoyment of all others over it. The contention that retroactive excise taxes are direct taxes has been frequently made on the theory that a tax on a privilege that has been completely exercised prior to its imposition

⁴⁴ *Springer v. United States*, 102 U.S. 586, 26 L.Ed. 253, sustaining the Civil War income tax upon personal earnings and income from personal property as an indirect tax. See discussion of this case in the Pollock Cases cited in footnote 43.

⁴⁵ *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 15 S.Ct. 673,

39 L.Ed. 759; *Id.*, 158 U.S. 601, 15 S.Ct. 912, 39 L.Ed. 1108.

⁴⁶ See *Bromley v. McCaughn*, 280 U.S. 124, 50 S.Ct. 46, 74 L.Ed. 226.

⁴⁷ *Eisner v. Macomber*, 252 U.S. 189, 40 S.Ct. 189, 64 L.Ed. 521, 9 A.L.R. 1570.

⁴⁸ *Bromley v. McCaughn*, 280 U.S. 124, 50 S.Ct. 46, 74 L.Ed. 226.

cannot be an excise, duty or impost, and must, accordingly, belong in the only other constitutionally established class of taxes. This contention has frequently prevailed in the lower federal courts,⁴⁹ but has never been sustained in the Supreme Court.⁵⁰ The need for invoking this argument against such taxation has practically disappeared since there has been deduced from the due process clause of the Fifth Amendment a prohibition against giving federal tax laws arbitrary retroactivity. The present status of income taxes on income from property sources will be later considered.

INDIRECT TAXES

120. The Constitution provides that all duties, imposts and excises shall be uniform throughout the United States. This provision requires territorial uniformity only, and is not a limit on the power of Congress to make classifications on other than a territorial basis in levying these indirect taxes.

What Taxes are Indirect Taxes

The other class of taxes which the Constitution permits Congress to impose consists of duties, imposts and excises. These are frequently referred to as indirect taxes. The definition of what taxes are such has been developed almost entirely as an incident to rejecting contentions that particular taxes, levied without the apportionment required for direct taxes, were invalidly imposed direct taxes. The historical argument based on the conception of indirect taxes prevailing at the time of the adoption of the Constitution has played an important role in giving the term its accepted content. It was with reference to this matter that it was stated that "a page of history is worth a volume of logic."⁵¹ The earliest case in which the issue arose involved a tax on carriages kept for use by their owner or for hire. This was sustained as an indirect tax not requiring apportionment among the states on the basis of their respective populations.⁵² The discussions in the several opinions ren-

⁴⁹ *Frew v. Bowers*, 2 Cir., 12 F.2d 625; *Wyeth v. Crooks*, D.C., 33 F.2d 1018. Contra, *Reed v. Howbert*, D. C., 8 F.2d 641; *Cleveland Trust Co. v. Routzahn*, D.C., 7 F.2d 483; *Shwab v. Doyle*, 6 Cir., 269 F. 321.

283 U.S. 15, 51 S.Ct. 324, 75 L.Ed. 809.

⁵¹ *New York Trust Co. v. Eisner*, 256 U.S. 345, 41 S.Ct. 506, 65 L.Ed. 963, 16 A.L.R. 660.

⁵² *Hylton v. United States*, 3 Dall. 171, 1 L.Ed. 556.

⁵⁰ See *Milliken v. United States*,

dered in the case show clearly that indirect taxes were deemed to include, as a minimum, duties on imports and taxes on consumption and expense. A more exhaustive enumeration in a later case included also taxes on the manufacture and sale of commodities, on the exercise of privileges, and on the conduct of particular business transactions, vocations, occupations and the like.⁵³ There are no privileges or transactions that may not be made the subject of a federal excise tax. The exercise of so-called "natural rights" and the pursuit of callings that may not be completely prohibited are as legitimate subjects of such a tax as are any other rights or activities. The power to tax a given calling or activity includes that of taxing any acts constituting a part thereof.⁵⁴ The privileges that Congress may tax are not confined to those that are created by laws enacted by it, but include those created under state law. Thus it may tax the transmission of property by will or under the laws of intestate succession which is wholly a creature of state law,⁵⁵ and the corporate excise tax on the transaction of business in corporate form may be validly imposed upon corporations organized under state laws.⁵⁶ Among the taxes that have been sustained as indirect are taxes on the use of carriages,⁵⁷ inheritance taxes,⁵⁸ estate taxes,⁵⁹ taxes on the issuance of banknotes,⁶⁰ on the sale of lottery tickets and liquor,⁶¹ and of securities,⁶² on sales made on exchanges,⁶³ gift taxes,⁶⁴ those on the transaction of a particular business or of business in corporate form,⁶⁵ and, most recently, a tax on employers with respect to

⁵³ *Thomas v. United States*, 192 U. S. 363, 24 S.Ct. 305, 48 L.Ed. 481.

⁵⁴ *CHAS. C. STEWARD MACHINE CO. v. DAVIS*, 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279, 109 A.L.R. 1293, *Black's Cas. Constitutional Law*, 2d, 195.

⁵⁵ *Knowlton v. Moore*, 178 U.S. 41, 58, 20 S.Ct. 747, 44 L.Ed. 976.

⁵⁶ *Flint v. Stone Tracy Co.*, 220 U. S. 107, 108, 31 S.Ct. 342, 55 L.Ed. 389, *Ann.Cas.*1912B, 1312.

⁵⁷ *Hylton v. United States*, 3 Dall. 171, 1 L.Ed. 556.

⁵⁸ *Knowlton v. Moore*, 178 U.S. 41, 58, 20 S.Ct. 747, 44 L.Ed. 976.

⁵⁹ *New York Trust Co. v. Eisner*, 256 U.S. 345, 41 S.Ct. 506, 65 L.Ed. 963, 16 A.L.R. 660.

⁶⁰ *Veazie Bank v. Fenno*, 8 Wall. 533, 19 L.Ed. 482.

⁶¹ *License Tax Cases*, 5 Wall. 462, 18 L.Ed. 497.

⁶² *Thomas v. United States*, 192 U. S. 363, 24 S.Ct. 305, 48 L.Ed. 481.

⁶³ *Nicol v. Ames*, 173 U.S. 509, 19 S.Ct. 522, 43 L.Ed. 786.

⁶⁴ *Bromley v. McCaughn*, 280 U.S. 124, 50 S.Ct. 46, 74 L.Ed. 226.

⁶⁵ *Spreckels Sugar Refining Co. v. McClain*, 192 U.S. 397, 24 S.Ct. 376, 48 L.Ed. 496; *Flint v. Stone Tracy*

their employment of laborers.⁶⁶ The view that a tax on the sale of property was a direct tax, though once supported by a dictum, has now been decisively rejected.⁶⁷ Taxes on dues,⁶⁸ and on the transportation of one's own property have also been held indirect.⁶⁹ The argument has sometimes been made that the inclusion in the gross estate used in computing the federal estate tax of property with respect to which no technical legal transfer occurred by the death of the taxpayer involved imposing a direct tax, but the contention has generally been denied.⁷⁰ The net result of the decisions is that the kinds of tax subjects within the federal taxing power include every tax subject that the states may tax, and that the taxes imposed in the exercise of that power are indirect unless imposed on property because of its ownership or upon persons because of, and with respect to, their ownership thereof.

Indirect Taxes and the Uniformity Requirement

The Constitution expressly requires duties, imposts and excises to be uniform throughout the United States.⁷¹ The decisions have universally held that this requires geographical uniformity only.⁷² This is satisfied if the same principles are used to define the existence, the amount, and the enforceability of the liability for the tax throughout the entire territorial area

Co., 220 U.S. 107, 108, 31 S.Ct. 342, 55 L.Ed. 389, Ann.Cas.1912B, 1312.

⁶⁶ CHAS. C. STEWARD MACHINE CO. v. DAVIS, 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279, 109 A.L.R. 1293, Black's Cas. Constitutional Law, 2d, 195.

⁶⁷ See discussion in dissenting opinion in Bromley v. McCaughn, 280 U.S. 124, 50 S.Ct. 46, 74 L.Ed. 226.

⁶⁸ Williams v. McCaughn, D.C., 17 F.2d 295.

⁶⁹ Standard Oil Co. v. McLaughlin, 9 Cir., 67 F.2d 111.

⁷⁰ Crooks v. Hibbard, 8 Cir., 33 F.2d 567 (sustains, as imposing an excise, inclusion in gross estate of decedent property to the extent of any interest therein of the surviving

spouse existing at time of decedent's death as dower, etc.); Allen v. Hengeler, 8 Cir., 32 F.2d 69; Contra, Munroe v. United States, D.C., 10 F.2d 230; Tyler v. United States, 281 U.S. 497, 50 S.Ct. 356, 74 L.Ed. 991, 69 A.L.R. 758 (sustains, as imposing an excise, inclusion in decedent's gross estate of property to the extent of any interest held by him therein at the time of his death as a joint tenant or tenant by the entirety).

⁷¹ U.S.C.A.Const. Art. 1, Section 8, Clause 1.

⁷² Knowlton v. Moore, 178 U.S. 41, 58, 20 S.Ct. 747, 44 L.Ed. 976; CHAS. C. STEWARD MACHINE CO. v. DAVIS, 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279, 109 A.L.R. 1293, Black's Cas. Constitutional Law, 2d, 195.

of the United States, at least so far as that area consists of the territory within the several states.⁷³ The uniformity clause does not limit Congress in levying indirect taxes to the selection of those tax subjects that are distributed uniformly through the United States.⁷⁴ The imposition of such a requirement would practically destroy the power to levy such taxes since such a uniform distribution of its appropriate subjects would be wholly fortuitous. The requisite uniformity is not defeated by the fact that state laws, which may vary from state to state, are made a factor in determining the amount of the federal tax. Thus the Federal Estate Tax Act in its early form included in a decedent's gross estate the value of his property to the extent of his interest therein at the time of his death which was subject after his death to the payment of charges against his estate and of administration expenses. The liability of such property for such charges was a matter determinable by the law of the state in which the property had its situs.⁷⁵ There existed considerable variations in the law of the various states on that matter. The effective rule of federal tax liability was, therefore, not precisely the same throughout the United States. It was, nevertheless, held that this did not violate the uniformity clause.⁷⁶ This result was supported by the view that the requisite uniformity was secured since all property liable for the specified classes of claims was includible in the gross estate regardless of where it was situated within the United States. It has also been affirmed that a provision in the Federal Estate Tax Act permitting a credit against the tax due the United States for a limited amount of state death duties paid with respect to the same estate did not result in an invalid lack of uniformity merely because some states imposed no such duties.⁷⁷ The uniformity clause was said not to require Congress "to

⁷³ *Florida v. Mellon*, 273 U.S. 12, 47 S.Ct. 265, 71 L.Ed. 511. The power of Congress to tax in exercising its exclusive legislative power over areas in which it has that under the Constitution is not limited by the provisions applicable to the taxing power conferred by U.S.C.A.Const. Article 1, Section 1, Clause 1; see U.S.C.A.Const. Art. 1, Section 8, Clause 17, and Art. 4, Section 3. For discussion of alleged limitations on its power to tax property within the District of Columbia, see *Heald*

v. District of Columbia, 259 U.S. 114, 42 S.Ct. 434, 66 L.Ed. 852.

⁷⁴ *Gottlieb v. White*, D.C., 1 F. Supp. 905, affirmed, 1 Cir., 69 F.2d 792.

⁷⁵ *Crooks v. Harrelson*, 282 U.S. 55, 51 S.Ct. 49, 75 L.Ed. 156.

⁷⁶ *Continental Illinois Bank & Trust Co. v. United States*, 7 Cir., 65 F.2d 506.

⁷⁷ *Florida v. Mellon*, 273 U.S. 12, 47 S.Ct. 265, 71 L.Ed. 511.

accommodate its legislation to the conflicting or dissimilar laws of the several states" so as to prevent the diverse conditions found in the various states from producing unlike results from the enforcement of the same rule of tax liability. The credit provision referred to above had been inserted into the Tax Act in order to reduce the advantages accruing to a state, which imposed no state inheritance or estate taxes, in competing with other states in inducing persons of wealth to become domiciled within it. Its purpose was to influence the tax policies of the several states, and, in practice, it proved quite effective. The only type of classification which the uniformity clause prevents Congress from making in imposing indirect taxes is, accordingly, that based on a territorial factor. It affords no protection against excise tax classifications based on any other factor. It is in no sense the equivalent of an "equal protection clause" with respect to this method of federal taxation.⁷⁸

The uniformity clause is clearly a limit on Congress in levying indirect taxes. A relatively recent case contained an intimation that its provisions were also violated by the discriminatory enforcement of an excise tax whose levy unquestionably met the requirements of that clause. The lack of uniformity in the enforcement of the tax was due to the acquiescence of the United States in injunctions enjoining its collection in one state and in the District of Columbia while insisting on its enforcement elsewhere. This discrimination was described as conflicting with the "principle underlying the constitutional provision directing that excises laid by Congress shall be uniform throughout the United States."⁷⁹ It is not wholly clear whether the discrimination was conceived as one producing a lack of territorial uniformity or whether the conception of uniformity was intended to be expanded to include something additional to mere territorial uniformity. Regardless of this, however, the statement does treat the uniformity clause as a limit not only upon the act of Congress in levying excise taxes but also upon the executive officers of the United States in their enforcement thereof. The position of the clause as an integral part of the provision conferring upon Congress the power to levy

⁷⁸ *Billings v. United States*, 232 U. S. 261, 34 S.Ct. 421, 58 L.Ed. 596; *BRUSHABER v. UNION PAC. R. CO.*, 240 U.S. 1, 36 S.Ct. 236, 60 L. Ed. 493, L.R.A.1917D, 414, Ann.Cas.

1917B, 713, Black's Cas. Constitutional Law, 2d, 202.

⁷⁹ *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498, 52 S.Ct. 260, 76 L.Ed. 422.

taxes suggests a doubt as to the correctness of this view, although the language of the clause affords a reasonable basis for the position taken by the Court.

INCOME TAXES

121. An income tax on income from other than property sources has always been held to be an indirect tax.
122. The Pollock Cases definitely established the principle that income taxes on income from both real and personal property were direct taxes because of the source of the income.
123. The effect of the decision in the Pollock Cases was overcome by the adoption of the Sixteenth Amendment which authorized Congress to "lay and collect taxes on incomes, from whatever source derived, without apportionment among the states, and without regard to any census or enumeration."
124. An income tax is now held to be an indirect tax, subject to the uniformity requirement, regardless of the source of the income on which the tax is imposed.
125. The Sixteenth Amendment permits Congress to tax income only, not capital.

Present Status of Income Taxes

The status of income taxes prior to, and after, the adoption of the Sixteenth Amendment, demands separate treatment. The few decisions antedating the Pollock Cases⁸⁰ treated them as indirect taxes although whether the source of the income was a factor in defining their constitutional character appears not to have been determined.⁸¹ It was in the Pollock Cases that the source of the income was made the decisive consideration in holding that income taxes upon income from property sources, whether real or personal property, were direct taxes. The theory accepted by a majority of the Court was that a tax on the income from property was in substance a tax on the property producing the income and, therefore, direct. The indirect nature of an income tax on the income from non-property sources was never denied.

⁸⁰ Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 15 S.Ct. 673, 39 L.Ed. 759; Id., 158 U.S. 601, 15 S.Ct. 912, 39 L.Ed. 1108.

100 U.S. 595, 25 L.Ed. 647; Springer v. United States, 102 U.S. 586, 26 L.Ed. 253. See also cases cited and discussed in the Pollock Cases, *supra*.

⁸¹ Michigan Cent. R. Co. v. Slack,

The decisions in the Pollock Cases made resort to a system of income taxes that would be generally accepted as just wholly impracticable. The bar was finally removed by the adoption in 1913 of the Sixteenth Amendment to the federal Constitution. This provided that Congress should "have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration." The power to levy income taxes had always existed, so that this Amendment was not required in order to confer that power upon Congress. It has in fact been specifically held that it did not give Congress the power to levy a tax on any tax subject which was for any reason beyond its power prior to the adoption of that Amendment.⁸² The sole purpose of its adoption has been said to have been "to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived."⁸³ This view of its purpose has determined the effects judicially given to its adoption. The problem, however, remained whether a tax on income from property sources, levied after its adoption, was still a direct tax. The adoption of the view that the Amendment had merely removed the need for apportionment among the states from this type of direct tax would have involved the consequence that such tax was thenceforward subject to neither that limitation nor the uniformity requirement. The development of limitations upon the federal taxing power from the due process clause of the Fifth Amendment had not yet begun, and its relevance was in fact rejected in the very case that decided the present constitutional character of an income tax on income from property sources.⁸⁴ It was undoubtedly such considerations as these that led the Supreme Court to hold that the Sixteenth Amendment transformed the taxes, which the Pollock Cases had held to be direct, into excises and thus subject to the uniformity requirement.⁸⁵ All federal income taxes levied since the adoption of the Sixteenth Amendment are thus excise taxes.

⁸² *Evans v. Gore*, 253 U.S. 245, 40 S.Ct. 550, 64 L.Ed. 887, 11 A.L.R. 519.

⁸³ *BRUSHABER v. UNION PAC. R. CO.*, 240 U.S. 1, 36 S.Ct. 236, 60 L. Ed. 493, L.R.A.1917D, 414, Ann.Cas. 1917B, 713, Black's Cas. Constitutional Law, 2d, 202.

⁸⁴ *BRUSHABER v. UNION PAC. R. CO.*, 240 U.S. 1, 36 S.Ct. 236, 60 L.Ed. 493, L.R.A.1917D, 414, Ann.Cas. 1917B, 713, Black's Cas. Constitutional Law, 2d, 202.

⁸⁵ *BRUSHABER v. UNION PAC. R. CO.*, 240 U.S. 1, 36 S.Ct. 236, 60 L.Ed. 493, L.R.A.1917D, 414, Ann.

What Constitutes Income

The Sixteenth Amendment has removed the necessity for apportionment among the states on the basis of their respective populations with respect to income taxes only. This fact has given rise to a new series of problems in the application of that apportionment rule. The problems take the legal form of what constitutes "income" within the meaning of that term as used in the Sixteenth Amendment. The present discussion will be limited to noting briefly a few of the most important cases in which the relevant concept of "income" has been developed. The Amendment does not require that income be ascertained on the basis of, and with respect to, each particular transaction that produces income, but permits it to be determined on the basis of the net result of the entire series of income transactions occurring within a specified period of time even though this may involve including within one such period income from a particular transaction which events in a subsequent period transform into a loss for such transaction taken as a unit.⁸⁶ The definition of "income" that has assumed a fundamental importance in all discussions of this problem is that given by the Supreme Court in *Eisner v. Macomber*.⁸⁷ It was defined as "the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets," and was specifically distinguished from a "gain accruing to capital or increment of value in the investment." The receipt of assets under the provisions of an agreement comprising a will contest, or by way of a gratuity to compensate the recipient for losses incurred in a business transaction as the result of accommodating the donor, has been held not income solely because not within that definition.⁸⁸ The same process of reasoning is constantly occurring in the opinions supporting the exclusion of particular receipts from income.

The application of the definition to specific cases has not proven to be a simple matter. Its use of the term "gain" has

Cas.1917B, 713. Black's Cas. Constitutional Law, 2d, 202. The reasoning by which this conclusion was reached is too involved for brief exposition.

⁸⁶ *Burnet v. Sanford & Brooks Co.*, 282 U.S. 359, 51 S.Ct. 150, 75 L.Ed. 383.

⁸⁷ 252 U.S. 189, 40 S.Ct. 189, 64 L. Ed. 521, 9 A.L.R. 1570.

⁸⁸ *Lyeth v. Hoey*, D.C., 20 F.Supp. 619; *Rice, Barton & Fales, Inc. v. Commissioner of Internal Revenue*, 1 Cir., 41 F.2d 339.

not resulted in excluding from income transactions those in fact involving no gain, nor in limiting the amount of income arising from such transactions to the gain arising in connection therewith. The receipt of a dividend, other than one payable in stock of the same kind as that with respect to which it is declared, constitutes income even though the recipient's wealth is not increased thereby.⁸⁹ Nor is the amount of taxable income from business required to be limited to the gain derived therefrom by permitting a deduction for the amount of the producer's capital consumed in earning that income.⁹⁰ The Constitution permits the adoption of a gross income concept of taxable income at least with respect to income from business.⁹¹ The existence of gain in the sense of an excess of the amount received in disposing of a capital asset over its cost to the person chargeable with income appears, however, to be required where it is disposed of in a manner other than by being used up in earning business income.⁹² But though this prevents treating a sale of such asset as one producing income unless the selling price exceeds its cost, the Sixteenth Amendment does not require that capital losses not connected with business be deductible to offset income from other sources. A provision limiting the deduction of capital losses to the amount of capital gains derived from other capital transactions does not result in an unapportioned tax on capital insofar as it increases taxable net income from other sources against which the capital net loss is not permitted to be credited.⁹³ The net effect of the decisions is that increase in the taxpayer's wealth is in some connections a requisite to the existence of, and a limit on the amount of, taxable income, and in other connections a factor

⁸⁹ *Lynch v. Hornby*, 247 U.S. 339, 38 S.Ct. 543, 62 L.Ed. 1149.

⁹⁰ *Kentucky Tobacco Products Co. v. Lucas*, D.C., 5 F.2d 723; *New Creek Co. v. Lederer*, 3 Cir., 295 F. 433; *Stanton v. Baltic Mining Co.*, 240 U.S. 103, 36 S.Ct. 278, 60 L.Ed. 546.

⁹¹ See, however, statement in *Davis v. United States*, 2 Cir., 87 F.2d 323, to the effect that *Eisner v. Macomber* limits taxable business income to that remaining after the deduction of the ordinary and necessary expenses incurred in earning

that income and of depreciation and depletion. Cf. with statement in *Avery v. Commissioner of Internal Revenue*, 7 Cir., 84 F.2d 905, that the Sixteenth Amendment, U.S.C.A. Const. Amend. 16, permits the taxation of either gross or net income, and that deductions are a matter of grace.

⁹² *Goodrich v. Edwards*, 255 U.S. 527, 41 S.Ct. 390, 65 L.Ed. 758.

⁹³ *Davis v. United States*, 2 Cir., 87 F.2d 323.

in neither.⁹⁴ Not every increase in a taxpayer's wealth may, however, be treated as income within the Sixteenth Amendment. It has been affirmed that the rental value of a building occupied by an owner is not income within the Amendment although it is clearly such in an economic sense.⁹⁵ The definition of income heretofore quoted specifically excluded unrealized increases in the value of investments.

Stock Dividends

The factor that must exist if an increase in a taxpayer's wealth is to constitute income within the Sixteenth Amendment is that it be realized. This is the significance of that part of the definition that income is a gain derived from labor, capital, or both combined, only if made available to the recipient for his own separate use. The essential element in realization is the acquisition by the taxpayer of an interest in property in which he had no interest before the transaction from which the income arises, or of an essentially different interest in the same property after that transaction than his interest therein before it. It was because the interest of a shareholder in the corporate assets after his receipt of a stock dividend was the same kind of an interest in the same assets as it was before he received such dividend that the stock dividend was held not to constitute income.⁹⁶ The payment of a dividend in the form of shares of another corporation involves realization of income for the recipient even though the shares received are those of a corporation to which the paying corporation has transferred all or a part of its assets in the course of a reorganization.⁹⁷ Nor is a dividend paid with respect to one class of a corporation's shares in the form of its shares of another class, such as a dividend

⁹⁴ The increase in wealth referred to may be produced by the particular act on whose occurrence the law conditions the existence of taxable income, or, what is more likely, by a process terminated by that act. The receipt of something by way of gift would illustrate the former (the actual tax laws have, however, specifically excluded the capital value of gifts from income); the receipt of a dividend from net earnings accumulated during the recipient's

ownership of his shares would illustrate the latter.

⁹⁵ *Helvering v. Independent Life Ins. Co.*, 292 U.S. 371, 54 S.Ct. 758, 78 L.Ed. 1311.

⁹⁶ *Eisner v. Macomber*, 252 U.S. 189, 40 S.Ct. 189, 64 L.Ed. 521, 9 A.L.R. 1570.

⁹⁷ *United States v. Phellis*, 257 U.S. 156, 42 S.Ct. 63, 66 L.Ed. 180; *Rockefeller v. United States*, 257 U.S. 176, 42 S.Ct. 68, 66 L.Ed. 186.

on its common paid in its own preferred stock, a non-taxable stock dividend since the shareholder's interest now represented by the shares received as a dividend represents an essentially different interest in the corporate assets than his prior interest therein when it was represented wholly by the shares on which the dividend was paid.⁹⁸ A dividend payable in the paying corporation's own debentures involves realization of income by the shareholder for the same reason.⁹⁹ The receipt by a shareholder of a right to subscribe to shares of the corporation issuing the rights is not income for the same reasons that a stock dividend of the kind involved in *Eisner v. Macomber* was held not to be income, nor does his exercise of such right involve the requisite realization.¹ Realization is deferred until another transaction occurs such as the sale of the tax-free stock dividend, the right, or of the shares acquired by the exercise of the right. The mere purchase of property for less than its true value does not involve realizing taxable income, but if the circumstances indicate that it was a device for indirectly conferring upon the purchaser a benefit whose acquisition would normally involve the realization of income, such as the distribution of what would amount to a taxable dividend, it will be held a constitutionally taxable realization of income.² There is some support for the view that realization can occur only if that which is acquired by the person to be charged with the income has a realizeable market value, but this view seems quite unjustified since it would make realization depend upon contingencies having no fundamental relation to the problem.³ A person may

⁹⁸ *Koshland v. Helvering*, 298 U.S. 441, 56 S.Ct. 767, 80 L.Ed. 1268, 105 A.L.R. 756.

⁹⁹ *Doerschuck v. United States, D. C.*, 274 F. 739.

¹ *Miles v. Safe Deposit & Trust Co.*, 259 U.S. 247, 42 S.Ct. 483, 66 L. Ed. 923.

² *Palmer v. Commissioner of Internal Revenue*, 302 U.S. 63, 58 S.Ct. 67, 82 L.Ed. 50, contains an excellent discussion of this problem.

³ There is language in *Eisner v. Macomber*, defining income as "a gain, a profit, something of exchangeable value proceeding from the prop-

erty." This language was the basis for a decision that there was no realization on an exchange of property for stock in a corporation, organized to take over such property, where the stock was found not to have "a readily realizable market value"; *Bourn v. McLaughlin, D.C.*, 19 F.2d 148. A similar conception differently phrased underlies a decision that buildings erected by a lessee on leased premises, which become the property of the lessor, cannot validly be treated as realized income for the lessor until he sells the property; *Hewitt Realty Co. v. Commissioner of Internal Revenue*, 2 Cir., 76 F.2d 880, 98 A.L.R. 1201.

realize income even though it is never in fact received by him. Thus a lessor railroad is deemed to receive income though the rent is paid directly to its security holders under the terms of the lease.⁴ The discharge by one person of another's liability to a third person involves a realization of income by such other person if the transaction is an income as distinct from a capital transaction. Hence the payment by a lessee railroad of the federal income tax due from the lessor produces income to the lessor.⁵ It has also been stated that a salary might be taxed to him who earned it even though it had been irrevocably assigned by anticipatory contract "devised to prevent the salary when paid from vesting even for a second in the man who earned it."⁶ The time when realization occurs depends upon the method employed in returning income of which the two most common are the cash receipts and disbursements method and the accruals method.

Capital Receipts

Realization is a requirement without which income taxable under the Sixteenth Amendment cannot exist, but its existence alone does not mean that such income does exist. The character of the transaction that produces those changes in a person's position that constitute the legal essentials of realization must also be considered, and if it is a pure capital transaction the existence of the facts constituting realization will not convert it into an income transaction. The clearest case of such kind is a capital receipt such as occurs when a corporation receives cash or other property in return for the issuance of its capital stock, or in exchange for the issuance of other capital obligation. It has been held that property and money subsidies granted by a government to a railroad to help defray its capital expenditures were not income within the Sixteenth Amendment but capital receipts.⁷ The receipt without gain after the effec-

⁴ *Rensselaer & S. R. Co. v. Irwin*, 2 Cir., 249 F. 726.

⁵ *United States v. Boston & M. R. Co.*, 279 U.S. 732, 49 S.Ct. 505, 73 L.Ed. 929.

⁶ *Lucas v. Earl*, 281 U.S. 111, 50 S.Ct. 241, 74 L.Ed. 731.

⁷ *Edwards v. Cuba R. Co.*, 268 U.S. 628, 45 S.Ct. 614, 69 L.Ed. 1124.

The reasoning of the Court in this case, so far as it makes the character of the receipt depend upon the disposition made thereof, is unsound. Other cases holding certain receipts not income but capital receipts, but in which the constitutional issue was not involved, are *Commissioner of Internal Revenue v. Norfolk Southern R. Co.*, 4 Cir., 63 F.2d 804; *Farmers' & Merchants' Bank v. Com-*

tive date of the Sixteenth Amendment of a claim that accrued in favor of a person prior thereto is not within the definition of income found in *Eisner v. Macomber*, even though it would have been income if the claim had arisen after that date.⁸ But conditional and contingent claims existing on that date were not transmuted into capital by that Amendment, and realization thereon subsequent thereto may be taxed without deducting anything for their value on said date.⁹ Income received prior thereto constitutes capital on that date and may not be even indirectly taxed thereafter. Hence no part of the premium received on the issue of bonds prior thereto may be taxed thereafter even indirectly by increasing such subsequent income by the amount of the amortization of such premium occurring thereafter or by decreasing the deductible interest by the amount thereof.¹⁰ The general rule observed in nearly every case is that that which was indubitably capital at the time the Sixteenth Amendment became effective may not be treated as income if thereafter recovered or converted without gain.

Capital Gains as Income

A capital transaction may, however, produce income taxable under the Sixteenth Amendment, since gains arising in connection with the sale or conversion of capital assets may be taxed as income thereunder.¹¹ The principal problem has been whether that Amendment imposed any restrictions upon Congress in measuring the amount of taxable gain. It has arisen with respect to gains on the disposition of capital assets acquired before and of those acquired after its adoption. There are certain principles whose application is independent of the time when the asset was acquired. The moment of its realization may be selected as that of the incidence of the tax on a capital gain,

missioner of Internal Revenue, 6 Cir., 59 F.2d 912; *Decatur Water Supply Co. v. Commissioner of Internal Revenue*, 7 Cir., 88 F.2d 341 (in this case the Court relied upon *Edwards v. Cuba R. Co.* in holding that income pledged to be used for predetermined capital purposes was a capital receipt).

⁸ *United States v. Guinzburg*, 2 Cir., 278 F. 363; *Plant v. Walsh*, D. C., 280 F. 722. The constitutional

point was not discussed in these cases.

⁹ *United States v. Safety Car Heating & Lighting Co.*, 297 U.S. 88, 56 S.Ct. 353, 80 L.Ed. 500.

¹⁰ *Old Colony R. Co. v. Commissioner of Internal Revenue*, 284 U.S. 552, 52 S.Ct. 211, 76 L.Ed. 484.

¹¹ *Merchants' Loan & Trust Co. v. Smetanka*, 255 U.S. 509, 41 S.Ct. 386, 65 L.Ed. 751, 15 A.L.R. 1305.

and the entire gain may be taxed during the income period in which it was realized although a part of it may have accrued prior to the commencement of that period.¹² It need not be limited to that accruing after the effective date of the statute under which it was first made taxable where that date is subsequent to the adoption of the Sixteenth Amendment.¹³ Furthermore there is nothing in the Sixteenth Amendment or in any other provision of the Constitution that limits the gain chargeable to its recipient to the increase in the value of the asset accruing during his ownership thereof.¹⁴ Hence it is valid to measure the gain on the disposition of property acquired by gift by the difference between the selling price and what would have been the applicable loss and gain basis in the hands of the donor or the last preceding owner who did not acquire it by gift even though this may charge the donee with gain accrued prior to his acquisition of the asset, and even though no increase in its value accrued during his ownership thereof.¹⁵ Its value at the time of its acquisition by him is not capital which the Constitution entitles him to recover free from tax. The same general principles sustain the statutory requirement that the gain on the disposition of assets acquired in certain "non-closed" transactions shall be computed by reference to the loss and gain basis that would apply if it were being disposed of by the prior owners from whom it was acquired in such "non-closed" transactions.¹⁶ They would also sustain the requirement

¹² *MacLaughlin v. Alliance Ins. Co.*, 286 U.S. 244, 52 S.Ct. 538, 76 L. Ed. 1083.

¹³ *MacLaughlin v. Alliance Ins. Co.*, 286 U.S. 244, 52 S.Ct. 538, 76 L. Ed. 1083.

¹⁴ *Taft v. Bowers*, 278 U.S. 470, 49 S.Ct. 199, 73 L. Ed. 460, 64 A.L.R. 362.

¹⁵ *Taft v. Bowers*, 278 U.S. 470, 49 S.Ct. 199, 73 L. Ed. 460, 64 A.L.R. 362.

¹⁶ *Newman, Saunders & Co. v. United States*, Ct.Cl., 36 F.2d 1009; *T. W. Phillips, Inc. v. Commissioner of Internal Revenue*, 3 Cir., 63 F.2d 101. The term "non-closed transaction" refers to certain types of exchanges of property the gain or loss

from which is not required to be taken into the taxpayer's account with the government as of the time of the exchange but only as of the later date when the asset received in the exchange is disposed of by a "closed transaction." In the cited cases property had been transferred by its owners to a corporation in exchange for all its stock under circumstances making the exchange a non-closed transaction so that the owners were not required to report any gain derived from the exchange. It was held that requiring such corporation to compute its gain on the sale of such property by reference to the loss and gain basis that would have applied had the former owners been selling it, involved no tax on capital but one on income.

that the gain on the disposition of assets acquired in certain other "non-closed" transactions be computed by reference to the loss and gain basis of the asset for which that disposed of was received in the "tax-free" exchange. So far as capital assets acquired after the effective date of the Sixteenth Amendment are concerned, cost is a permissible loss or gain basis in the case of purchased assets. It cannot be said to have been determined whether that Amendment requires that any part of the proceeds of the sale or other disposition of assets acquired without cost to the vendor be treated as capital in computing taxable gain. It does, however, require that gain on the sale or other disposition of an asset acquired prior to its effective date be so computed as to exclude what was capital prior thereto, and seems to require that the capital protected be not less than cost where the vendor acquired it by purchase.¹⁷ In other cases, the protected value need not exceed its value on said date. It has never been authoritatively determined that it may in no case be less than the value on said date although this seems implicit in the theory on which the cases dealing with the method for computing gain on the sale or other disposition of such assets were discussed and decided. The constitutional point was not, however, considered in them.

Advantageous Discharge of Liabilities as Income

There is an important series of cases involving the question whether the discharge of an obligation for less than the value of the assets acquired by its assumption produces income taxable under the Sixteenth Amendment. It was first held in *Bowers v. Kerbaugh-Empire Company*¹⁸ that the advantageous payment of a debt could not constitutionally be so treated where the whole series of transactions of which it was a part showed a loss to the taxpayer. The argument was based on the view that the definition of income given in *Eisner v. Macomber* precluded its existence where the whole transaction showed a loss. The effect of every discharge of a liability for less than its face value at the time it is discharged produces an increase in the debtor's net wealth regardless of what has happened to the

¹⁷ This seems to be the only reasonable basis on which to interpret the results in *Goodrich v. Edwards*, 255 U.S. 527, 41 S.Ct. 390, 65 L.Ed.

758, and in *Walsh v. Brewster*, 255 U.S. 536, 41 S.Ct. 392, 65 L.Ed. 762.

¹⁸ *Bowers v. Kerbaugh-Empire Co.*, 271 U.S. 170, 46 S.Ct. 449, 70 L.Ed. 886.

assets acquired by its assumption.¹⁹ If the assets acquired when the debt was incurred equalled in value the amount of the debt at that time, the advantageous discharge of any part of that debt reduces to that extent the cost of acquiring those assets. This reduction might be taken care of by adjusting either the basis at which they enter a producer's cost or on which his gain or loss on their subsequent disposition is computed,²⁰ or by treating the advantageous discharge itself as a realization of a gain. The last alternative states the method which is both the most convenient and based on the soundest economic analysis. It has ultimately prevailed over the others, and *Bowers v. Kerbaugh Empire Co.* has been limited to its facts but not expressly overruled. Hence the repurchase of his bonds by a debtor at less than their issue price received by him involves the realization by him of income equal to the difference between the issue price and the re-purchase price.²¹ If, however, no assets were originally acquired by the debtor by their issuance, as is the case where issued as a dividend to its stockholders, their redemption for less than par produces no income to the debtor but amounts to a mere retention of a surplus it had promised to distribute.²² Furthermore, if the surrounding circumstances indicate that the creditor was making a capital contribution to the debtor, no income accrues to the latter.²³ The result of the decisions is to limit the situations in which income is real-

¹⁹ This is true, even where the payment takes all the assets owned by the debtor at the time the debt is discharged, to the extent that it reduces the claims against assets thereafter acquired by him.

²⁰ See for discussion of this method *Commissioner of Internal Revenue v. American Chiclé Co.*, 2 Cir., 65 F. 2d 454, reversed, *Helvering v. American Chiclé Co.*, 291 U.S. 426, 54 S. Ct. 460, 78 L.Ed. 891.

²¹ *United States v. Kirby Lumber Co.*, 284 U.S. 1, 52 S.Ct. 4, 76 L.Ed. 131; *Helvering v. American Chiclé Co.*, 291 U.S. 426, 54 S.Ct. 460, 78 L.Ed. 891; *Commissioner of Internal Revenue v. Coast Wise Transp. Corp.*, 1 Cir., 62 F.2d 332. A reference to the opinions of the lower courts in the first two cases shows

that the constitutional issue was either before them or in their minds.

²² *Commissioner of Internal Revenue v. Rail Joint Co.*, 2 Cir., 61 F.2d 751. No constitutional point is discussed herein. See also *General Utilities & Operating Co. v. Helvering*, 296 U.S. 200, 56 S.Ct. 185, 80 L.Ed. 154 (The payment of a dividend of "x" dollars by distributing securities acquired at a cost of less than "x" dollars does not involve realization by the distributing corporation of any income. No constitutional point was discussed).

²³ *Commissioner of Internal Revenue v. Auto Strop Safety Razor Co., Inc.*, 2 Cir., 74 F.2d 226; *Burnet v. John F. Campbell Co.*, 60 App.D.C. 197, 50 F.2d 487.

ized through the advantageous discharge of a liability to those in which the obligation was incurred for the acquisition of assets, whether current or fixed. Although the constitutional issue was expressly considered in some only of the cases referred to in this discussion, all were influenced by the definition of income formulated in *Eisner v. Macomber*.

EXPORT DUTIES AND PORT PREFERENCES

126. The Constitution expressly provides that "No tax or duty shall be laid on articles exported from any state," and that "No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to, or from, one state be obliged to enter, clear, or pay duties in another."

Taxes on Exports from States Prohibited

The Constitution expressly provides that "No tax or duty shall be laid on articles exported from any state."²⁴ The term "exports" as therein used refers only to those exported to a foreign country, not to goods whose immediate destination is a territory of the United States.²⁵ The provision does not prohibit Congress from levying taxes on the manufacture of goods within the United States even though these are being produced for export to a foreign country.²⁶ Its immediate aim is to give immunity from taxation to property in the actual course of exportation, but the realization of that objective has been held to justify expanding the scope of the prohibition to include taxes and duties other than those imposed upon the exports themselves. Federally imposed stamp taxes on foreign bills of lading,²⁷ upon policies insuring cargoes of exports against marine risks during their export voyage,²⁸ and upon charter parties

²⁴ U.S.C.A.Const. Art. 1, Section 9. Said Section is concerned exclusively with limitations upon the powers of the federal government, and most of its states limitations on the powers of Congress only.

²⁵ *Dooley v. United States*, 183 U. S. 151, 22 S.Ct. 62, 46 L.Ed. 128. The tax alleged to violate this provision in this case was one on goods imported from the United States into

Porto Rico after its annexation by the United States.

²⁶ *Thompson v. United States*, 142 U.S. 471, 12 S.Ct. 299, 35 L.Ed. 1084; *Cornell v. Coyne*, 192 U.S. 418, 24 S.Ct. 383, 48 L.Ed. 504.

²⁷ *Fairbank v. United States*, 181 U.S. 283, 21 S.Ct. 648, 45 L.Ed. 862.

²⁸ *Thames & Mersey Marine Ins. Co. v. United States*, 237 U.S. 19, 35

which were exclusively for the carriage of goods from the ports of a state to a foreign country,²⁹ have all been held to violate this constitutional provision because they involved a burdensome tax upon the indispensable means of export trade. A federal sales tax violates this provision as applied to a sale for export if the very act that passes the title commits the goods to the export carrier, since they are in the channels of exportation when the tax liability accrues.³⁰ The fact that it was imposed under a general law taxing sales does not prevent its invalidity as applied to such a sale. A tax whose effect upon exportation is remote and indirect is not in violation of this provision. Hence a general income tax which is not imposed upon income from export trade as such, but upon net income from all sources, is not rendered invalid under this provision as applied to one whose income for the given taxable year was derived chiefly from such trade,³¹ nor does a violation result merely because domestic corporations engaged therein are taxed on their total net income while foreign corporations so engaged are taxed only on their net income from sources within the United States.³² The tax on such net income is at least as remote from the act of exportation as is one on the manufacture of goods intended for export. There has been no determination of the validity under this provision of a general tax on gross income as applied to income derived from the export trade. It is fairly certain that a tax on either the gross or net income from export trade as such would be held invalid. A fee charged by the government for services rendered in connection with exports or exportation is not a tax or duty, and requiring its payment does not violate the prohibition against taxing exports.³³

Port Preferences

The Constitution also provides that "No preference shall be given by any regulation of commerce or revenue to the ports

S.Ct. 496, 59 L.Ed. 821, Ann.Cas. 1915D, 1087.

²⁹ United States v. Hvoslef, 237 U. S. 1, 35 S.Ct. 459, 59 L.Ed. 813, Ann. Cas.1916A, 286.

³⁰ Spalding & Bros. v. Edwards, 262 U.S. 66, 43 S.Ct. 485, 67 L.Ed. 865.

³¹ PECK & CO. v. LOWE, 247 U.S. 165, 38 S.Ct. 432, 62 L.Ed. 1049, Black's Cas. Constitutional Law, 2d, 211.

³² National Paper & Type Co. v. Bowers, 266 U.S. 373, 45 S.Ct. 133, 69 L.Ed. 331.

³³ Pace v. Burgess, 92 U.S. 372, 23 L.Ed. 657.

of one state over those of another," and that "vessels bound to, or from, one state" shall not "be obliged to enter, clear, or pay duties in another."³⁴ There have been only occasional decisions construing these provisions, and they have involved only alleged preferences through regulations of commerce. The general conceptions developed in them would, however, be applicable in determining whether these provisions had been violated by regulations of revenue. The term "state" does not include any territory of the United States, whether or not organized and incorporated therein.³⁵ Furthermore it has been stated that "what is forbidden is not discrimination between individual ports within the same or different states, but discrimination between states."³⁶

TAXATION OF FEDERAL JUDICIAL, AND PRESIDENTIAL, SALARIES

127. The imposition of an income tax on the salaries of the judges of the constitutional courts of the United States, and on that of the President of the United States, constitutes diminution of those salaries, and is in violation of the express provisions of the Constitution prohibiting the diminution of those salaries during the periods specified therein.

There are certain general constitutional provisions not expressly relating to taxation from which have been deduced several important limitations on the federal taxing power. Section 1 of Article 3 expressly provides that the judges of the courts in which it vests the judicial power of the United States "shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office." The inclusion of the compensation paid a judge of such court in his gross income in computing his federal income tax has been held to be a violation of this provision. The first case so holding involved a judge whose appointment antedated the adoption of the Sixteenth Amendment.³⁷ The same result was later reached in a case involving the salary of a judge appointed to his office aft-

³⁴ U.S.C.A.Const., Art. 1, Section 9.

435; *Louisiana Public Service Comm. v. Texas & N. O. R. Co.*, 284 U.S. 125, 52 S.Ct. 74, 76 L.Ed. 201.

³⁵ *Alaska v. Troy*, 258 U.S. 101, 42 S.Ct. 241, 66 L.Ed. 487.

³⁷ *Evans v. Gore*, 253 U.S. 245, 40 S.Ct. 550, 64 L.Ed. 887, 11 A.L.R. 519.

³⁶ *Pennsylvania v. Wheeling & B. Bridge Co.*, 18 How. 421, 15 L.Ed.

er the enactment of the statute under which the salary was sought to be taxed.³⁸ The principal factor inducing these constructions of this constitutional provision was the view that the maintenance of judicial independence was intended to be secured not only by protecting judicial salaries against direct reduction but from indirect diminution as well. The view that that provision of the Sixteenth Amendment which authorizes Congress to levy taxes on "income, from whatever source derived" warranted the tax was rejected.³⁹ Even those Justices of the Supreme Court who dissented in *Evans v. Gore* admitted that attempts to single out such salaries for taxation would violate the prohibition against salary diminutions. It is also certain that attempts to circumvent the effect of these decisions by denying to federal judges deductions or exemptions against their other income permitted to be taken by other taxpayers would violate this constitutional provision.⁴⁰ The prohibition against the reduction of judicial salaries, however, applies only to judges of constitutional courts, that is, courts established to receive any part of the judicial power conferred upon the United States by Article 3 of the Constitution. The Supreme Court of the District of Columbia and the Court of Appeals of the District of Columbia as presently constituted are such,⁴¹ but the Court of Claims as presently constituted is not such.⁴² The Supreme Court of the United States and the federal District Courts and Circuit Courts of Appeal are constitutional courts. The same principle that protects the judicial salaries against diminution by including them in the definition of gross income under federal income tax legislation, or by any other device thereunder, also protects that of the President of the United States since Article 2, Section 2, prohibits its diminution during the period for which he was elected.⁴³

³⁸ *Miles v. Graham*, 268 U.S. 501, 45 S.Ct. 601, 69 L.Ed. 1067.

³⁹ *Evans v. Gore*, 253 U.S. 245, 40 S.Ct. 550, 64 L.Ed. 887, 11 A.L.R. 519.

⁴⁰ *United States v. Ritchie*, Fed. Cas. 16168 (Holding that the prohibition against federal taxation of the salary of a state officer could not be circumvented by reducing the exemption allowed against his other income by the amount of his state salary. Quere whether a similar prin-

ciple would apply if statute sought indirectly to reach judicial salaries by such device?)

⁴¹ *O'Donoghue v. United States*, 289 U.S. 516, 53 S.Ct. 740, 77 L.Ed. 1356.

⁴² *Williams v. United States*, 289 U.S. 553, 53 S.Ct. 751, 77 L.Ed. 1372. Note that *Miles v. Graham*, *supra*, involved salary of a judge of the Court of Claims.

⁴³ See prevailing opinion in *Evans*

FEDERAL TAX POWER AND DUE PROCESS

128. The Fifth Amendment to the Constitution provides that no person shall be deprived of property without due process of law. This provision limits Congress in exercising its taxing powers in many important respects.
129. The jurisdictional limits imposed on the United States in exercising its taxing power are not the same as those imposed upon the states by the due process clause of the Fourteenth Amendment. Federal citizenship alone is a sufficient jurisdictional basis in the case of most taxes, and the jurisdictional principles in relation to other nations and their subjects are those recognized by international law.
130. The said due process clause prohibits arbitrary exercises of the taxing power. This prohibits the enactment and enforcement of arbitrary principles in imposing taxes, in measuring their amount, and in enforcing them. It also prohibits giving tax laws retrospective operation in every case in which that would produce unjust and arbitrary results.

The Fifth Amendment to the federal Constitution provides that no person shall be deprived of property without due process of law. A similarly worded provision of the Fourteenth Amendment has been construed as imposing an important series of restrictions upon the taxing power of the states. The position that the due process clause of the Fifth Amendment limited the federal taxing power, except in matters of tax procedure, was vigorously denied as recently as the decision in the *Brushaber Case*.⁴⁴ This position was, however, abandoned for the first time in the case of *Nichols v. Coolidge* in which the retrospective application of a provision of the Federal Estate Tax Act was held to violate the due process clause of the Fifth Amendment.⁴⁵ That clause has since then had its principal, though not its sole, application in connection with the problem of retroactive taxation. Some of the more important of these applications will be briefly discussed.

v. *Gore*, 253 U.S. 245, 40 S.Ct. 550, 64 L.Ed. 887, 11 A.L.R. 519.

Cas.1917B, 713, Black's Cas. Constitutional Law, 2d, 202.

⁴⁴ *BRUSHABER v. UNION PAC. R. CO.*, 240 U.S. 1, 36 S.Ct. 236, 60 L.Ed. 493, L.R.A.1917D, 414, Ann.

⁴⁵ 274 U.S. 531, 47 S.Ct. 710, 71 L. Ed. 1184, 52 A.L.R. 1081.

Due Process, Taxation, and Expropriation

The express specification in the grant of the federal taxing power of the purposes for which taxes may be levied has obviated the necessity of relying upon the due process clause of the Fifth Amendment to restrict those purposes by a doctrine of "federal public purposes" comparable to the restriction imposed on the states' taxing power by the "public purpose" doctrine based on the due process clause of the Fourteenth Amendment. The former of these due process clauses has not yet been held a factor in limiting the scope of the language that defines the purposes for which federal taxes may be imposed.⁴⁶ While it has been intimated that a "tax" whose principal purpose and effect was to expropriate money from one group for the benefit of another would be arbitrary and not an exercise of the taxing power, the statement was not based on the conception of due process.⁴⁷ A contention was made in a later case that an exaction purporting to be levied under the taxing power violated the due process clause of the Fifth Amendment because it was an arbitrary exaction from one group of persons for the exclusive benefit of another, but this was disposed of by the argument that that clause was not violated because the exaction was a true tax imposed for a constitutional purpose.⁴⁸ It thus appears that, if an exaction purporting to be a tax can on any basis be held a true tax levied for a constitutional purpose, it will not be held violative of the due process clause as an expropriation of one group for the exclusive benefit of another group. This does not, however, exclude consideration of that factor in determining whether a given exaction is a true tax for a valid purpose. But since all taxation may be conceived as having that effect to some extent, it is certain that this factor will receive scant weight except in cases showing an extreme degree of arbitrariness.

Extent of Federal Jurisdiction to Tax

Every sovereign state that is a member of the international community recognizes certain limits on its power to tax the citizens of other states with respect to both their persons and their

⁴⁶ U.S.C.A.Const. Art. 1, Section 8: "The Congress shall have the power to lay and collect taxes * * * to pay the debts and provide for the common defence and general welfare of the United States."

S. 1, 56 S.Ct. 312, 80 L.Ed. 477, 102 A.L.R. 914.

⁴⁸ CINCINNATI SOAP CO. v. UNITED STATES, 301 U.S. 308, 57 S.Ct. 764, 81 L.Ed. 1122, Black's Cas. Constitutional Law, 2d, 189.

⁴⁷ United States v. Butler, 297 U.

economic and other interests and activities. The United States is a member of that community, and adjusts its tax policy to those generally recognized limitations. These principles, however, afford practically no protection to those who are citizens of the nation imposing the tax except insofar as they prevent a nation from actually enforcing tax obligations imposed upon its citizens by methods requiring acts within the territory of another. The question whether the federal Constitution imposes any jurisdictional limits upon the federal taxing power has been several times before the Supreme Court in cases involving both citizens of the United States and citizens of other nations. The only provision that might so operate is the due process clause of the Fifth Amendment, and the principal reason for the view that it imposes such limits is the fact that the due process clause of the Fourteenth Amendment has been construed to impose important jurisdictional limits on the taxing power of the states. The Supreme Court has thus far never held a federal tax invalid as beyond the constitutional jurisdiction of the United States to impose, although the taxes sustained in some of its decisions would almost certainly have violated the due process clause of the Fourteenth Amendment had they been imposed by one of the states.⁴⁹ Existing decisions thus indicate merely the factors that justify the inference that jurisdiction exists, but give no adequate and certain indication of those that negative the existence of jurisdiction. The fact that the person on whom, or on whose property or activities, the tax is imposed is a citizen of the United States is itself a sufficient jurisdictional basis to support the tax. The leading case on this matter sustained the levy of an income tax on a citizen who had been domiciled in a foreign country during the whole year for which the tax was imposed and whose entire income for that year had been derived from sources without the United States.⁵⁰ The decision was justified by invoking the presumption that "government by its very nature benefits the citizen and his property wherever found." It was stated in an earlier decision that an excise tax on the use by citizens of foreign built pleasure boats could validly apply to such use thereof by a citizen domiciled in a foreign country,⁵¹

⁴⁹ Such doubt as may exist as to the last part of this statement is due to the fact that the jurisdictional limits on the states have been developed in cases in which the issue concerned a state's power to tax taxable subjects that were within the

taxing power of another state rather than of a foreign nation.

⁵⁰ *Cook v. Tait*, 265 U.S. 47, 44 S. Ct. 444, 68 L.Ed. 895.

⁵¹ *United States v. Golet*, 232 U. S. 293, 34 S.Ct. 431, 58 L.Ed. 610.

and it was decided in another case that imposing that tax on the use of such vessel by a citizen domiciled in the United States did not violate the due process clause of the Fifth Amendment.⁵² The fact that the vessels were never used within the United States or its territorial waters was held immaterial. The same reasoning would support a tax on citizens with respect to their activities wherever conducted. The United States has the power to require the inclusion in the gross estate of a decedent dying abroad, but domiciled and resident within it, of tangible and intangible personalty having a situs within a foreign country.⁵³ No case has been found in which taxation on the basis of United States citizenship has been held beyond the federal power of taxation.

The extent to which the United States has the power to tax citizens of other nations is more limited than its power over its own citizens, at least where the alien is neither domiciled nor resident within the United States. The leading case on this subject involved the validity of including within the gross estate of an alien dying domiciled without the United States certain intangible personalty which was at the time of his death in the possession of persons within the United States who managed it there on his behalf. The intangibles consisted of stocks of domestic corporations, bonds of both foreign governments and domestic municipalities, and bonds of both foreign and domestic corporations. They were not used in connection with a business carried on within the United States. The power of the United States to require the inclusion of them all in the decedent's gross estate was sustained against the claim that such treatment would violate the due process clause of the Fifth Amendment.⁵⁴ The Court reaffirmed a position that it had announced in earlier cases⁵⁵ that the jurisdictional limits imposed by the due process clause of the Fourteenth Amendment on the states did not define the jurisdictional limits of the federal taxing power. The ultimate basis of the former was found in the fact that the Constitution protected each state from encroachment on its sphere of action by the other states, and it was affirmed that the Con-

⁵² *United States v. Bennett*, 232 U. S. 299, 34 S.Ct. 433, 58 L.Ed. 612.

⁵³ S.Ct. 457, 77 L.Ed. 844, 86 A.L.R. 747.

⁵³ *Guaranty Trust Co. v. Commissioner of Internal Revenue*, 2 Cir., 79 F.2d 245.

⁵⁵ See *United States v. Bennett*, 232 U.S. 299, 34 S.Ct. 433, 58 L.Ed. 612, and *Cook v. Tait*, 265 U.S. 47, 44 S.Ct. 444, 68 L.Ed. 895.

⁵⁴ *Burnet v. Brooks*, 288 U.S. 378,

stitution created no such relation between the United States and foreign countries as it had created between the states. The principles that define the constitutional jurisdiction of the federal taxing power in relation to other nations and their subjects are those recognized in international relations. Shares of stock in foreign corporations may also be included in a non-resident alien's gross estate if the certificates are in the possession of an agent within the United States.⁵⁶ The income from such securities in charge of an agent within the United States may also be taxed.⁵⁷ In all the cases thus far decided the Court has held those tax subjects belonging to non-resident aliens which were involved in those cases to be within the constitutional power of the United States to tax. However, the general principles governing the taxation by one nation of the citizens of another and their interests and activities recognize some limits, and also distinguish between the taxation of citizens of other countries on the basis of whether they are domiciled or resident, or not domiciled or resident, within the taxing country. The Supreme Court has clearly indicated that the constitutional limits on the federal jurisdiction to tax aliens and their interests and activities are definable by reference to the factors referred to in the preceding sentence.

Prohibition Against Arbitrary Taxation

The due process clause of the Fifth Amendment limits Congress in the selection of the principles determining both the existence, and the amount of, tax liabilities. It does so by prohibiting taxation that is so "arbitrary and capricious as to amount to confiscation."⁵⁸ The tests for determining whether a given tax, or a given application of a tax statute, is arbitrary, and, therefore, invalid are none too definite. The subsequent discussion will consider some of the situations in which it has been judicially applied. It has been held violative of due process to tax one person with respect to the property of another, or to measure a tax on one person by including in the measure the property or tax subjects belonging to another.⁵⁹ The cases give at least some indication of when this factor is present. The creation of an irrebuttable presumption that property disposed of

⁵⁶ First Nat. Bank of Boston v. Commissioner of Internal Revenue, 1 Cir., 63 F.2d 685.

⁵⁷ De Ganay v. Lederer, 250 U.S. 376, 39 S.Ct. 524, 63 L.Ed. 1042.

⁵⁸ Nichols v. Coolidge, 274 U.S. 531, 47 S.Ct. 710, 71 L.Ed. 1184, 52 A.L.R. 1081.

⁵⁹ Heiner v. Donnan, 285 U.S. 312, 52 S.Ct. 358, 76 L.Ed. 772.

by a decedent within two years prior to his death was transferred in contemplation of death and includible as such in his gross estate under the Federal Estate Tax Act produces the prohibited result in every case in which the transfer was not in contemplation of death. It is, therefore, invalid as measuring the tax on one person by reference to another's property, and is, furthermore, so arbitrary on other grounds as to violate due process.⁶⁰

The principal situations in which this objection has been urged have been in relation to certain provisions constituting important features of the federal income tax system. To treat a "business trust" as a taxable entity instead of taxing the income of the trust to the holders of its participation certificates does not tax to it that which is in law the income of the individual certificate holders since the income was in fact earned in the name of the association. Due process does not prohibit such tax action.⁶¹ The taxation to the settlor of a trust, who reserves a complete and beneficial power of revocation, of the trust income in fact received by the cestui is not violative of due process as taxing one person on another's income. The income that is subject to a person's unfettered control and which he is free to enjoy at his option may reasonably be taxed to him whether or not he sees fit to enjoy it.⁶² The same decision has been made where the settlor could revoke only with the assent of a trustee whose interest in that respect was not adverse to that of the settlor.⁶³ It has been held that there is no violation of this principle in charging the settlor of an irrevocable trust with its income if the trust terms require it to be applied to discharge a legal or moral obligation of the settlor.⁶⁴ The measurement of the gain

⁶⁰ *Heiner v. Donnan*, 285 U.S. 312, 52 S.Ct. 358, 76 L.Ed. 772.

⁶¹ *Burk-Waggoner Oil Ass'n v. Hopkins*, 269 U.S. 110, 46 S.Ct. 48, 70 L.Ed. 183.

⁶² *Corliss v. Bowers*, 281 U.S. 376, 50 S.Ct. 336, 74 L.Ed. 916.

⁶³ *Reinecke v. Smith*, 289 U.S. 172, 53 S.Ct. 570, 77 L.Ed. 1109. The statutory provision taxed to the settlor the income of a trust if he had, during the taxable year, alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of

the corpus of the trust. For other cases see *Simpson v. Commissioner of Internal Revenue*, 7 Cir., 77 F.2d 668; *Bowler v. Helvering*, 2 Cir., 80 F.2d 103.

⁶⁴ *Burnet v. Wells*, 289 U.S. 670, 53 S.Ct. 761, 77 L.Ed. 1439 (sustaining a provision requiring the inclusion in the settlor's income of the trust income applied by the trustee to payment of insurance premiums on policies on settlor's life the proceeds of which were irrevocably payable to the trustee on specified trusts; the trust was also irrevocable).

to a person on his sale of an asset acquired by a tax-free exchange, by reference to the gain basis of the person from whom the asset was acquired in the exchange, does not deny the vendor due process merely because he is thereby charged with a gain accruing during the former owner's ownership of the asset.⁶⁵ The person receiving property in such tax-free exchanges is deemed to have acquired it with the knowledge of his potential liability to be thus taxed, and to step into the former owner's position with respect thereto. Nor does a provision authorizing the tax officials to allocate among the different members of a commonly owned group of businesses the income of the group violate due process by taxing one person on another's income if the allocation is in accord with a reasonable method.⁶⁶ There have thus far been but few cases in which the courts have found violations of the principle, derived from the due process clause of the Fifth Amendment, prohibiting the taxation to one person of the property or income of another, or the measurement of a tax on one person by reference to the property or income of another. The need to guard against opening the door to tax avoidance is frequently invoked to support particular tax provisions not only against the objection discussed in this paragraph but also against a general claim that they are so arbitrary as to deny the taxpayer due process. This was the principal basis for sustaining a provision requiring the inclusion in a decedent's gross estate of property of which he had disposed during his lifetime where he reserved until his death, alone or in conjunction with any other person, the power to alter or revoke,⁶⁷ and for sustaining the inclusion in the gross estate of a decedent's interest in a joint tenancy to the extent that it represented his investment therein.⁶⁸

Due Process and Retroactive Taxation

The due process clause has in many cases been held to invalidate a federal tax because it was deemed to be arbitrarily retroactive in its application. It is now firmly established that an

⁶⁵ *Perthun Holding Corp. v. Commissioner of Internal Revenue*, 2 Cir., 61 F.2d 785.

⁶⁶ *Asiatic Petroleum Co. v. Commissioner of Internal Revenue*, 2 Cir., 79 F.2d 234.

⁶⁷ *Helvering v. City Bank Farm-*

ers' Trust Co., 296 U.S. 85, 56 S.Ct. 70, 80 L.Ed. 62.

⁶⁸ *Tyler v. United States*, 281 U.S. 497, 50 S.Ct. 356, 74 L.Ed. 991, 69 A.L.R. 758. Cf. *Bowers v. Commissioner of Internal Revenue*, 7 Cir., 90 F.2d 790, and *Foster v. Commissioner of Internal Revenue*, 9 Cir., 90 F.2d 486.

income tax may be levied upon the entire income accruing to a taxpayer during a given calendar year although the statute imposing it was enacted subsequent to its beginning.⁶⁹ Nor does it violate due process to give such tax laws limited retroactivity for relatively short periods to cover profits from transactions completed while the statute was in process of enactment.⁷⁰ It has even been stated that Congress might in one year impose an income tax measured by the income of the preceding year.⁷¹ The same decisions have been made with respect to applying to transactions occurring during the year of, but prior to the date of, the enactment of the statute its provisions for computing the gain thereon.⁷² Hence the gain on the sale of property acquired by gift may be measured by the rule enacted for the first time by a statute that became law during the year of the sale but after the date of the sale.⁷³ The mere fact that past transactions antedating the enactment of a statute constitute a factor in defining the extent of a tax liability resulting from a transaction occurring after its enactment does not involve a retroactive application thereof, and nothing in the due process clause prohibits this.⁷⁴ It has, however, never been held, or even intimated, that an income tax statute may reach back indefinitely into the past to tax income earned long prior to its enactment, and the rule that due process prohibits arbitrary taxation would put a limit to the extent of the permissible retroactivity even of income taxes.^{74a}

There have been many decisions that due process is violated by giving retroactive operation to such excises as estate taxes

⁶⁹ *BRUSHABER v. UNION PAC. R. CO.*, 240 U.S. 1, 36 S.Ct. 236, 60 L.Ed. 493, L.R.A.1917D, 414, Ann. Cas.1917B, 713, Black's Cas. Constitutional Law, 2d, 202.

⁷⁰ *United States v. Hudson*, 299 U.S. 498, 57 S.Ct. 309, 81 L.Ed. 370.

⁷¹ *Stockdale v. Atlantic Insurance Co.*, 20 Wall. 323, 22 L.Ed. 348.

⁷² *Cooper v. United States*, 280 U.S. 409, 50 S.Ct. 164, 74 L.Ed. 516; *Heineman v. United States*, Ct.Cl., 52 F.2d 1035.

⁷³ *Cooper v. United States*, 280 U.S. 409, 50 S.Ct. 164, 74 L.Ed. 516.

Other cases considering specific problems of retroactive federal income taxes are *Phipps v. Bowers*, 2 Cir., 49 F.2d 996; *United Business Corporation of America v. Commissioner of Internal Revenue*, 2 Cir., 62 F.2d 754.

⁷⁴ *Reinecke v. Smith*, 289 U.S. 172, 53 S.Ct. 570, 77 L.Ed. 1109; *Burnet v. Wells*, 289 U.S. 670, 53 S.Ct. 761, 77 L.Ed. 1439.

^{74a} See the discussion in *Welch v. Henry*, 305 U.S. —, 59 S.Ct. 121, 83 L.Ed. —, construing the due process clause of the Fourteenth Amendment as a limit on retroactive state income taxes.

and gift taxes. A tax act is not, however, being retroactively applied merely because it imposes a tax on a transaction that began prior to its enactment or measures the tax by reference thereto.⁷⁵ This principle has been one of the most important in reducing the number of situations in which a tax law is deemed to be given retroactive operation in the constitutional sense of that term. A statutory provision requiring the inclusion in a decedent's gross estate of property of which he had made an inter vivos transfer under which he retained until his death a power to revest the property in himself is not being given retroactive application in the constitutional sense because it is applied to a transfer of that kind made prior to the enactment of such provision. The application of such a provision under those circumstances does not violate the due process clause of the Fifth Amendment.⁷⁶ The principle that has almost invariably been applied is that the statute in force when a decedent dies may be validly applied so as to require the inclusion in his gross estate of any property that remained subject to his control up to the date of his death, or in which he retained an economic interest that shifted at the time of his death, regardless of whether the transaction under which he acquired that power or interest occurred prior to or after the enactment of that statute, or whether or not there was in force at that time any statute requiring the inclusion of such property in his gross estate. It was on the basis of that principle that it has been held not violative of due process to require property disposed of by a decedent during his life time, when no estate tax statute required its inclusion in the gross estate, to be included in his gross estate in computing an estate tax under a subsequently enacted law in force at the time of his death, where he reserved a power to revoke the transfer either alone or in conjunction with a person having no adverse interest to the revocation,⁷⁷ or a power to affect the prior dispositions made in the deed of transfer,⁷⁸ or

⁷⁵ *Lee v. Commissioner of Internal Revenue*, 61 App.D.C. 33, 57 F.2d 399 (sustains inclusion in decedent's gross estate of property passing under a general power exercised by him although he had received the power under the will of a person dying long before there was any federal estate tax act).

278 U.S. 339, 49 S.Ct. 123, 73 L.Ed. 410, 66 A.L.R. 397.

⁷⁷ *Reinecke v. Northern Trust Co.*, 278 U.S. 339, 49 S.Ct. 123, 73 L.Ed. 410, 66 A.L.R. 397; *Commissioner of Internal Revenue v. Erickson*, 1 Cir., 74 F.2d 327.

⁷⁸ *Porter v. Commissioner of Internal Revenue*, 288 U.S. 436, 53 S.

where he retained a reversionary interest thereunder.⁷⁹ Nor does it involve any invalid retroactivity to treat as part of his gross estate so much of the value of property held by him as joint tenant or a tenant by the entirety as has not in fact been contributed by the other tenants, although the tenancies were created under a deed antedating the existence of a statute including such interest.⁸⁰ The same principle has been applied to validate the inclusion in the insured's gross estate of the proceeds of policies on his life, paid for by him, payable to named beneficiaries, even though the policies were taken out when no statute required their inclusion if, under the terms of the policies, he retained up to his death the power to change the beneficiaries, to receive their cash surrender values, or any other beneficial interest in the policies.⁸¹ Provisions of the federal estate tax statutes have been invariably held invalidly retroactive when they have required the inclusion in a decedent's gross estate of property of which he had completely divested himself by a transfer antedating the statute upon which its inclusion is based.⁸² They have occasionally been held invalidly retroactive when the interest retained by him continued after the enactment of the statute but terminated prior to his death.⁸³ In the absence of the situations described in the last two sentences, the overwhelming majority of the decisions sustain applying the law in force at death irrespective of whether the property was transferred before or after the enactment of the statute on which the tax was based. The general principles that have been held to invalidate retroactive estate taxes have also been the basis for holding violative of due process the application of the federal gift tax Act to gifts fully executed prior to its enactment, even though the gift was made when its enactment was a practical certainty.⁸⁴

Ct. 451, 77 L.Ed. 880; *Commissioner of Internal Revenue v. Chase Nat. Bank*, 2 Cir., 82 F.2d 157.

⁷⁹ *Klein v. U. S.*, 283 U.S. 231, 51 S.Ct. 398, 75 L.Ed. 996.

⁸⁰ *Third Nat. Bank & Trust Co. v. White*, D.C., 45 F.2d 911; *Griswold v. Helvering*, 290 U.S. 56, 54 S.Ct. 5, 78 L.Ed. 166; *Gwinn v. Commissioner of Internal Revenue*, 287 U.S. 224, 53 S.Ct. 157, 77 L.Ed. 270.

⁸¹ *Heiner v. Grandin*, 3 Cir., 44 F.2d 141; *Levy's Estate v. Commis-*

sioner of Internal Revenue, 2 Cir., 65 F.2d 412; *Sampson v. United States*, D.C., 1 F.Supp. 95.

⁸² *Nichols v. Coolidge*, 274 U.S. 531, 47 S.Ct. 710, 71 L.Ed. 1184, 52 A.L.R. 1081; *White v. Poor*, 296 U.S. 98, 56 S.Ct. 66, 80 L.Ed. 80; *Helvering v. Helmholz*, 296 U.S. 93, 56 S.Ct. 68, 80 L.Ed. 76; *Welch v. Hassett*, 1 Cir., 90 F.2d 833.

⁸³ *Helvering v. Parker*, 8 Cir., 84 F.2d 838.

⁸⁴ *Blodgett v. Holden*, 275 U.S. 142,

The amount of a tax is as dependent upon the tax rates as upon the base to which the rates are applied. It has, however, been held not arbitrary, and hence not violative of due process, to apply to a transfer taxable when made the higher rates levied under the statute in force when the grantor died.⁸⁵ The transfer involved was one in contemplation of death, and the Court took the position that the grantor had been forewarned by its inclusion under the law in force when it was made that it was liable to be taxed on the same basis as a testamentary transfer, by the law in force at the transferror's death. This was said to prevent the application of the subsequently enacted rates from being arbitrary. In all the situations thus far considered, except the last, the affected inter vivos transfers were made when the law in force did not require the inclusion of the transferred property in the gross estate of the grantor upon his death. A different situation exists when it was includible under the law in force when made, and there is a subsequent repeal of that law with the re-enactment of a new statute which also includes the transfer among those taxable. The application of the latter statute to the transfer is valid, involving no unconstitutional retroactivity.⁸⁶ The retroactive validation of illegally collected taxes involves the creation of a liability after the occurrence of the events that condition its existence, but this does not deny due process in those cases in which Congress had the power to levy the tax at the time of its collection.⁸⁷ It has also been held not violative of due process to validate taxes illegally collected after the running of a statute of limitations had destroyed the liability where the statute had been allowed to run because the taxpayer had filed a claim in abatement.⁸⁸ The case differs from that last cited in that there had been an original liability, a factor referred to by the Court to support its conclusion that the result was not arbitrary.

276 U.S. 594, 48 S.Ct. 105, 72 L.Ed. 206; *Untermeyer v. Anderson*, 276 U.S. 440, 48 S.Ct. 353, 72 L.Ed. 645.

⁸⁵ *Mittlen v. United States*, 283 U.S. 15, 51 S.Ct. 324, 75 L.Ed. 809.

⁸⁶ *Phillips v. Dime Trust & Safe Deposit Co.*, 284 U.S. 160, 52 S.Ct. 46, 76 L.Ed. 220; *O'Shaughnessy v.*

Commissioner of Internal Revenue, 6 Cir., 60 F.2d 235; *Schoenheit v. Lucas*, 4 Cir., 44 F.2d 476.

⁸⁷ *United States v. Heinszen & Co.*, 206 U.S. 370, 27 S.Ct. 742, 51 L.Ed. 1098, 11 Ann.Cas. 688.

⁸⁸ *Graham v. Goodcell*, 282 U.S. 409, 51 S.Ct. 186, 75 L.Ed. 415.

Due Process and Equality in Taxation

The foregoing represent some of the most important phases of the due process clause of the Fifth Amendment in its application to the federal taxing power. Except in the instances already considered reliance upon it has afforded the taxpayer but slight relief from exertions of that power. There remain a few more matters on which the Supreme Court has passed. The system under which the property disposed of by a decedent during his life by the methods of transfer enumerated in the federal estate tax acts are all aggregated with the property passing at death for purposes of computing the tax instead of treating each as a separately taxable transfer is not so arbitrary as to deny the taxpayer due process.⁸⁹ The Constitution contains no "equal protection clause" applicable to the federal government. Attempts have been made to deduce from the due process clause of the Fifth Amendment the same kind of limitations on Congress in exercising its power to classify in levying taxes that the equal protection clause of the Fourteenth Amendment imposes on the states in exercising their taxing powers. The Supreme Court has thus far never found a classification made by Congress in levying taxes to be so arbitrary as to violate due process, but has sustained numerous classifications as valid. These include limiting a tax on the use of pleasure boats to the use of those built outside the United States,⁹⁰ applying a progressively graduated rate structure in levying income and gift taxes,⁹¹ creating exemptions from such taxes,⁹² and from the social security taxes,⁹³ and taxing domestic corporations upon all their

⁸⁹ *Chase Nat. Bank of City of New York v. United States*, 278 U.S. 327, 49 S.Ct. 126, 73 L.Ed. 405, 63 A.L.R. 388.

⁹⁰ *United States v. Bennett*, 232 U.S. 299, 34 S.Ct. 433, 58 L.Ed. 612.

⁹¹ *BRUSHABER v. UNION PAC. R. CO.*, 240 U.S. 1, 36 S.Ct. 236, 60 L.Ed. 493, L.R.A.1917D, 414, Ann. Cas.1917B, 713, Black's Cas. Constitutional Law, 2d, 202; *Bromley v. McCaughn*, 280 U.S. 124, 50 S.Ct. 46, 74 L.Ed. 226. For other cases discussing various objections that particular classifications made in connection with federal income taxes were so discriminatory as to violate due proc-

ess, see *Stanton v. Baltic Mining Co.*, 240 U.S. 103, 36 S.Ct. 278, 60 L.Ed. 546; *Tyee Realty Co. v. Anderson*, 240 U.S. 115, 36 S.Ct. 281, 60 L.Ed. 554.

⁹² *BRUSHABER v. UNION PAC. R. CO.*, 240 U.S. 1, 36 S.Ct. 236, 60 L.Ed. 493, L.R.A.1917D, 414, Ann. Cas.1917B, 713, Black's Cas. Constitutional Law, 2d, 202; *Bromley v. McCaughn*, 280 U.S. 124, 50 S.Ct. 46, 74 L.Ed. 226.

⁹³ *CHAS. C. STEWARD MACHINE CO. v. DAVIS*, 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279, 109 A.L.R. 1293, Black's Cas. Constitutional Law, 2d, 195; *Helvering v. Davis*,

income while taxing foreign corporations upon only such income as was derived from sources within the United States.⁹⁴ The reasoning to sustain these classifications follows closely that used in applying the equal protection clause, and considerations of policy have been freely invoked and relied upon. In no case has the Court denied that the arbitrariness prohibited by the due process clause may consist in arbitrary classifications in distributing the tax burden of the federal government. On the other hand in no case has it definitely affirmed that the due process clause imposes a limit on the power of Congress to classify in exercising its taxing powers. It is safe to state, however, that that clause does impose a limit to Congress' power in this matter.

Collection of Taxes

The due process clause is a limit on the methods for enforcing federal taxes. The power to tax includes that of enforcing payment thereof by imposing penalties. Such penalties are not deemed punishments, and hence their collection by administrative proceedings does not violate either the due process clause or any of the constitutional provisions for the protection of those accused of crime.⁹⁵ Nor is due process violated by forfeiting goods with respect to which a tax has been imposed for their concealment for purposes of evading the tax, and subjecting to similar forfeiture the vehicles used in connection with attempts at evading the revenue laws. Forfeiture has been sustained even where the owner of the vehicle was wholly innocent of wrong and the wrongdoers were lawfully in the possession thereof as conditional vendees.⁹⁶ The Court stated, however, that it would reserve the question whether such forfeiture would be valid if the vehicle had been stolen from the owner or otherwise taken from him without his privity or consent. Due process does require that the taxpayer be given notice and an opportunity to be heard at some stage of the proceedings before his liability is finally fixed, but it does not require a judicial hearing with re-

301 U.S. 619, 57 S.Ct. 904, 81 L.Ed. 1307, 109 A.L.R. 1319.

⁹⁴ *National Paper & Type Co. v. Bowers*, 266 U.S. 373, 45 S.Ct. 133, 69 L.Ed. 331. In this case the Court said: "Even if we were to concede, which we cannot, that the Fifth Amendment [U.S.C.A.Const. Amend. 5] in enjoining due process of law requires as part thereof equality of

taxation, it certainly could not be held to apply to a subject-matter not within this country."

⁹⁵ *McDowell v. Heiner*, D.C., 9 F. 2d 120, affirmed 3 Cir., 15 F.2d 1015.

⁹⁶ *Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 41 S.Ct. 189, 65 L.Ed. 376.

spect to any matters affecting his liability other than questions of law.

Taxpayers' Remedies

The Congress may impose conditions upon a taxpayer's right to recover taxes illegally collected. The rule that taxes voluntarily paid are not recoverable in the absence of a statute providing therefor represents an extreme position whose validity appears to have gone wholly unquestioned. The question has, however, arisen whether due process limits Congress in imposing conditions on a taxpayer's right to recover taxes illegally collected. The power to impose any conditions whatever on the right to a refund of taxes voluntarily paid would appear to be implicit in the government's right to retain them. A different problem arises if a remedy for the recovery of such taxes, existing at the time of their payment, is subsequently altered or subjected to conditions not imposed when the taxes were paid. The taxpayer who has paid an illegal tax at a time when the laws provide a remedy for its recovery acquires a vested right to its refund.⁹⁷ The Constitution does not, however, assure him that the remedy for its enforcement shall remain unchanged. The substitution of an exclusive remedy against the government for a suit against the tax collector does not deny the taxpayer due process if the government admits its liability for taxes illegally collected on its behalf.⁹⁸ The change is valid even as to suits commenced against a collector prior to its enactment, and such suit may validly be dismissed.⁹⁹ Nor is it requisite that the substitute remedy be wholly judicial. The requirements of due process are satisfied by according the taxpayer an exclusively administrative remedy if his legal rights are suitably protected. A system that gives him an adequate opportunity to be heard by the administrative board, with a right to a judicial review on every legal question involved, adequately protects his rights and accords him due process.¹ Reasonable conditions may also be imposed on his right to a refund of such taxes even though

⁹⁷ *United States v. Jefferson Electric Mfg. Co.*, 291 U.S. 386, 54 S.Ct. 443, 78 L.Ed. 859.

⁹⁸ *Anniston Mfg. Co. v. Davis*, 301 U.S. 337, 57 S.Ct. 816, 81 L.Ed. 1143.

⁹⁹ *Anniston Mfg. Co. v. Davis*, 301 U.S. 337, 57 S.Ct. 816, 81 L.Ed. 1143.

¹ *Anniston Mfg. Co. v. Davis*, 301 U.S. 337, 57 S.Ct. 816, 81 L.Ed. 1143. Due process is not denied a taxpayer by requiring him to exhaust an administrative remedy as a prerequisite to a suit to recover taxes illegally assessed and collected; *Dodge v. Osborn*, 240 U.S. 118, 36 S.Ct. 275, 60 L.Ed. 557.

it was not subject to such condition at the time it arose.² A requirement that he prove that he has in fact borne the burden of the tax whose recovery he seeks, and that he has neither shifted it forward nor backward, is reasonable and not violative of due process, at least where the situation is such that these facts can be shown.³ The Court, in the case last cited, disclaimed passing on the validity of such requirement if the facts required to be proved should ultimately be found incapable of proof. The right to recover taxes paid involuntarily and under governmental compulsion is one whose denial would involve a violation of the due process clause.⁴ The extent to which the right to recover taxes so paid may be regulated consistently with the requirements of due process has never been precisely defined, but it may be subjected to reasonable regulations.⁵ Statutes dispensing with conditions precedent to the right to a refund of illegally collected taxes, which were in force when the taxes were paid, may conceivably deny due process, not to the taxpayer, but to the collector from whom he is permitted to recover them. Such statutes are valid if they provide for the assumption of the collector's liability by the government for which he collected such taxes. Thus a statute giving the taxpayer a right to recover illegally paid taxes that he did not acquire under the law in force when he paid them does not deny due process to the collector, to whom such taxes were paid, if the government assumes any liability to which such collector may be subjected through this change in the law.⁶

² *United States v. Jefferson Electric Mfg. Co.*, 291 U.S. 386, 54 S.Ct. 443, 78 L.Ed. 859.

³ *Anniston Mfg. Co. v. Davis*, 301 U.S. 337, 57 S.Ct. 816, 81 L.Ed. 1143.

⁴ *Ward v. Board of Com'rs of Love County*, 253 U.S. 17, 40 S.Ct. 419, 64 L.Ed. 751; *Carpenter v. Shaw*, 280 U.S. 363, 50 S.Ct. 121, 74 L.Ed. 478. These cases involved state statutes whose effect was a denial of a right

to recover state taxes that were invalid under the federal Constitution and which had been paid under duress.

⁵ *Burrill v. Locomobile Co.*, 258 U.S. 34, 42 S.Ct. 256, 66 L.Ed. 450. The comments made in footnote 4 apply to this case also.

⁶ *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 53 S.Ct. 620, 77 L.Ed. 1265.

OTHER FISCAL POWERS

131. Congress possesses the power, under the Constitution, to borrow money on the credit of the United States, to coin money and regulate the value thereof and of foreign coins, and to provide for the punishment of counterfeiting the securities and current coin of the United States.
132. The first two powers mentioned in the preceding paragraph have constituted important bases for legislation establishing a national banking system and a national currency.
133. The national power over the currency is protected against certain forms of state action by constitutional provisions prohibiting the states from coining money, emitting bills of credit, and making anything but gold and silver coins a legal tender in the payment of debts.
134. The power to borrow money on the credit of the United States, when exercised, creates binding obligations that may not be destroyed through the exercise of any other national legislative power.

Fiscal Powers and National Banking Systems

The taxing power constitutes but one of the fiscal powers available to government. Others include the powers to borrow, and to coin money or to provide other forms of circulating medium. The Constitution has endowed the federal government with those other fiscal powers as well as with that of taxation.⁷ They have furnished the basis for a vast body of federal legislation dealing with matters not immediately and directly indicated by the terms in which they have been granted, but which has been sustained as necessary and proper for carrying them into execution. Particular legislation can often be justified as necessary and proper for carrying into execution any single one of these several powers, but in practice much of this body of legislation has been sustained as necessary and proper for carrying into execution two or more of them, including the power to tax. These fiscal powers, or one or more of them, constitute the principal basis

⁷ U.S.C.A.Const. Art. 1, Section 8, Clause 2, confers upon Congress the power "To borrow money on the credit of the United States." Clause 5 thereof confers upon it the power "To coin money, regulate the value thereof, and of foreign coins." Clause

6 thereof confers the power to protect the exercise of the foregoing by granting to Congress the power "To provide for the punishment of counterfeiting the securities and current coin of the United States."

of the federal government's power to establish national banking systems to furnish credit facilities adjusted to the varying needs of different classes of borrowers. It was early established that they could be exercised by creating a bank for national purposes whose principal activities consisted of private banking operations and but a small portion of whose shares were owned by the federal government.⁸ The factors that made its incorporation and the grant of its powers proper exercises of federal powers were that it was to be used in aid of the government's fiscal operations and to furnish a circulating medium through the exercise of its note issue power. It has been said that the last cited decision clearly warranted the conclusion that the legislation creating the national banking system was valid.⁹ The banks of that system are privately owned by private shareholders. The creation of the Federal Reserve System,¹⁰ and of the Federal Deposit Insurance Corporation,¹¹ have also been sustained as proper means for carrying into effect the fiscal powers of the national government. As an incident to the creation of these systems Congress may authorize state banks to become members of the Federal Reserve System and of the system for the insurance of bank deposits.¹² The fiscal powers may as validly be exercised to provide credit for the long time requirements of agriculture as for the needs of the business community. The law providing for the creation of the Federal Land Bank System has been held a proper exercise of those powers.¹³ Among the reasons invoked to sustain it were the facts that the banks of the system were to serve as depositories of federal funds, and as a market for federal bonds through the requirement that a limited percentage of their capital must be invested therein. The limited extent of banking powers conferred upon them was held not to prevent them from being proper governmental agencies for the execution of its fiscal powers. How far the foregoing reasons, or either of them, would justify the creation of corporations of a kind not customarily availed of as governmental fiscal agents or possessing no banking powers has not been determined.

⁸ McCULLOCH v. MARYLAND, 4 Wheat. 316, 4 L.Ed. 579, Black's Cas. Constitutional Law, 2d, 96.

⁹ Farmers' & M. Nat. Bank v. Dearing, 91 U.S. 29, 23 L.Ed. 196.

¹⁰ Hiatt v. United States, 7 Cir., 4 F.2d 374.

¹¹ United States v. Doherty, D.C., 18 F.Supp. 793.

¹² Same cases as cited in footnote 10 and 11.

¹³ Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 41 S.Ct. 243, 65 L.Ed. 577.

The power to create these various systems of banking and credit institutions includes that of protecting them against discriminatory state action. It also includes that of affirmatively conferring upon them such private functions as will enable them successfully to meet the competition of competing institutions existing under state law. A statute authorizing national banks to engage in the activities pursued by trust companies in the state in which the bank was located, when not in contravention of state law, is valid.¹⁴ Another statute whose practical effect was to permit such banks to act as executors if the law of the state in which they were situated permitted competing trust companies to act as executors was held valid although it involved a limited federal control over the acts of state courts.¹⁵ The state's general control over the administration of decedent estates cannot deprive Congress of its power to give even private federal agencies powers that will enable them to compete successfully with those who are acting under state law. The same principle would validate Congressional legislation reasonably necessary to protect its agencies regardless of the resulting limitations upon a state's exercise of any of its powers. Its taxing powers may be limited not only to prevent discriminatory taxation against national banks, but even to confer upon agencies created by the exercise of these fiscal powers a competitive advantage in their exercise of their private functions. Thus the farm loan bonds issued by federal land banks may be made immune from state taxation although these bonds were among the instrumentalities through which those banks performed their purely private banking functions.¹⁶ A like principle justifies limiting the states' power to tax national banks to the methods prescribed by Congress.¹⁷ The protection of these institutions, created by the exercise of the fiscal powers of the national government, is not limited to that expressly provided for by Congressional legislation, but includes others implied from the general principle that prevents states from so exercising their powers as to interfere with, or impede, the functioning of these instrumentalities even

¹⁴ *First Nat. Bank of Bay City v. Fellows ex rel. Union Trust Co.*, 244 U.S. 416, 37 S.Ct. 734, 61 L.Ed. 1233, L.R.A.1918C, 283, Ann.Cas.1918D, 1169.

¹⁵ *Missouri ex rel. Burnes Nat. Bank of St. Joseph v. Duncan*, 265 U.S. 17, 44 S.Ct. 427, 68 L.Ed. 881.

¹⁶ *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 41 S.Ct. 243, 65 L.Ed. 577.

¹⁷ *Owensboro Nat. Bank v. Owensboro*, 173 U.S. 664, 19 S.Ct. 537, 43 L.Ed. 850.

when their private activities are involved.¹⁸ The protection of those activities is a means for insuring that those agencies will be able to perform the federal functions for whose exercise they were established. This is the ultimate reason both for the protection accorded them apart from any legislation therefor and for the power of Congress to accord them protection beyond that measure as well as to define the scope of their activities.

Fiscal Powers and National Currency Systems

The power to borrow money on the credit of the United States, and to coin and regulate the value of money, though not the exclusive bases therefor, have been the two most important supports for legislation providing the nation with a circulating medium additional to that consisting of the deposits and circulating notes of national banks and other banks comprising the Federal Reserve System. The latter of these powers clearly authorizes the provision of a metallic currency, but does not impliedly limit Congress to that form of circulating medium.¹⁹ It may determine the metal or metals that shall constitute the basis of the currency system. Limitations may be imposed upon the use and ownership of the monetary metal, even to the extent of prohibiting its private ownership for all except designated purposes.²⁰ The imposition of these limitations does not violate the due process clause of the Fifth Amendment,²¹ but if it is requisitioned by the government, just compensation must be paid under that provision of the Fifth Amendment that prohibits the taking of private property for public use without just compensation.²² The power of Congress to determine the amount of the monetary metal that is to constitute the monetary unit and standard of value is unquestionable. This includes the power of devaluing the monetary unit by reducing its gold content.²³ In order to

¹⁸ For discussion of this problem see Chapter 4, Sections 83-86.

¹⁹ Legal Tender Cases, 12 Wall. 457, 20 L.Ed. 287.

²⁰ *Ling Su Fan v. United States*, 218 U.S. 302, 31 S.Ct. 21, 54 L.Ed. 1049, 30 L.R.A.,N.S., 1176 (prohibition of the export of monetary metals sustained); *United States v. Campbell*, D.C., 5 F.Supp. 156 (prohibiting possession of gold sustained). See also remarks of the Supreme Court in *Nortz v. United*

States, 294 U.S. 317, 55 S.Ct. 428, 79 L.Ed. 907, 95 A.L.R. 1346.

²¹ *Ling Su Fan v. United States*, 218 U.S. 302, 31 S.Ct. 21, 54 L.Ed. 1049, 30 L.R.A.,N.S., 1176.

²² *United States v. Campbell*, D.C., 5 F.Supp. 156.

²³ *NORMAN v. BALTIMORE & OHIO R. CO.*, 294 U.S. 240, 55 S.Ct. 407, 79 L.Ed. 885, 95 A.L.R. 1352, *Black's Cas. Constitutional Law*, 2d, 214.

make its purposes effective, and in aid of securing a uniform currency throughout the United States, it may invalidate private contracts that interfere with the effective realization of the purposes of the devaluation. It may not only prohibit the making of such contracts for the future but void those entered in prior to the legislation providing for such devaluation.²⁴ Such prior contracts may reasonably be deemed by Congress to interfere with securing a uniform currency so far as they would, if permitted to be carried out, involve one standard for some contracts and another for others. This was the basis for sustaining, as within Congress' power, a statute voiding the "gold clause" in prior contracts.²⁵ Nor does legislation devaluing the monetary unit, and voiding contracts in conflict with the policy of such legislation, deprive creditors of their property without due process of law.²⁶ A similar line of reasoning would equally sustain legislation increasing the metallic content of the monetary unit. The power of Congress is not, however, limited to providing a currency on a metallic basis. It may provide a purely fiat money by giving its own promissory notes such legal tender qualities as will give them the character of a circulating medium. This has been sustained as a proper exercise of a congeries of the powers specifically conferred upon it of which the powers to tax, to pay the debts of the United States, to borrow on its credit, and to coin money, have been the most important.²⁷ Nor is due process violated by making such fiat money legal tender for debts incurred prior to the enactment of the legislation authorizing its issue.²⁸

The power to provide a national currency also authorizes legislation to protect it. There is no doubt that Congress could prohibit the use as a circulating medium of notes issued by state banks. This was clearly intimated in a decision sustaining a discriminatory federal tax on the issue of such notes whose prac-

²⁴ *NORMAN v. BALTIMORE & OHIO R. CO.*, 294 U.S. 240, 55 S.Ct. 407, 79 L.Ed. 885, 95 A.L.R. 1352, Black's Cas. Constitutional Law, 2d, 214.

²⁵ *NORMAN v. BALTIMORE & OHIO R. CO.*, 294 U.S. 240, 55 S.Ct. 407, 79 L.Ed. 885, 95 A.L.R. 1352, Black's Cas. Constitutional Law, 2d, 214.

²⁶ *NORMAN v. BALTIMORE & OHIO R. CO.*, 294 U.S. 240, 55 S.Ct.

407, 79 L.Ed. 885, 95 A.L.R. 1352, Black's Cas. Constitutional Law, 2d, 214.

²⁷ *Legal Tender Cases*, 12 Wall. 457, 20 L.Ed. 287; *Julliard v. Greenman*, 110 U.S. 421, 4 S.Ct. 122, 28 L. Ed. 204.

²⁸ *Legal Tender Cases*, 12 Wall. 457, 20 L.Ed. 287, overruling *Hepburn v. Griswold*, 8 Wall. 603, 19 L.Ed. 513.

tical effect was to tax them out of existence.²⁹ The deposits of such banks in fact function as a part of the nation's supply of circulating medium, but no attempt has yet been made to prevent their use as such by exercises of any federal power, nor has any occasion yet arisen for deciding whether Congress could require all banks to be federally incorporated. Specific power to protect the nation's currency is also found in that provision of the Constitution that confers upon Congress the power to punish the counterfeiting of the securities and current coin of the United States.³⁰ The national power over the currency is also protected against action by the states by the express provisions of Article 1, Section 10, that prohibit the states from coining money, emitting bills of credit, and making anything but gold and silver coin a tender in the payment of debts. The combined effect of these prohibitions is to make the establishment of an adequate state currency system a practical impossibility. The prohibition against coining money would deprive such a system of metallic coins minted under state authority; that against emitting bills of credit would exclude fiat money issued by the state; and that limiting a state's power to determine what shall constitute legal tender in effect permits it to give legal tender qualities only to forms of money which it itself has no authority to issue.³¹ The second of these prohibitions has received a judicial construction under which a state can create institutions that can issue circulating notes. The thing that is prohibited is the issuance

²⁹ *Veazie Bank v. Fenno*, 8 Wall. 533, 19 L.Ed. 482.

Jona, 120 U.S. 479, 7 S.Ct. 628, 30 L.Ed. 728.

³⁰ U.S.C.A.Const. Art. 1, Section 8, Clause 6. See following cases construing scope of this clause, and its effect upon state powers to punish acts also punishable under federal legislation enacted under its authority: *United States v. Marigold*, 9 How. 560, 13 L.Ed. 257; *Fox v. Ohio*, 5 How. 410, 12 L.Ed. 213. The power of Congress to punish the counterfeiting within the United States of the notes and other securities of foreign governments is based on the power of the national government to represent the nation in all its intercourse with foreign nations; see *United States v. Ar-*

³¹ The federal government's currency powers include that of defining what shall constitute a legal tender in the payment of private debts. Its power to determine what shall constitute legal tender in payment of obligations due a state has been doubted; *Lane County v. Oregon*, 7 Wall. 71, 19 L.Ed. 101. Whatever implied power to make gold and silver coins legal tender in the payment of debts a state may derive from the prohibition against making anything else such legal tender, is, of course, subject to the superior power of Congress to regulate the entire matter.

of bills of credit by a state. To constitute a bill of credit within the meaning of this prohibition, the evidence of indebtedness must be issued not only by a state but also on its credit, and must be designed to circulate as money. It is not essential that it possess general legal tender qualities. The negotiable notes issued by a state on its own credit and which were a legal tender for taxes due the state and in payment of the salaries of state officers have been held void for violating this prohibition.³² That prohibition thus limits the form in which a state may borrow although it does not prevent a state from borrowing. The circulating notes of a bank, secured by its assets, do not, however, violate this prohibition even though the corporation was organized by the state and all its stock is owned by the state.³³ This decision enables a state to provide its people with a form of circulating medium. Its inability to give this medium legal tender qualities, except for the payment of claims due the state and its political subdivisions, makes this a weak competitor for any currency system established by, or under the authority of, the national government. Furthermore the latter government can by taxation prevent even this form of competition with its functions.³⁴ Its power to provide a uniform national currency is one of the most important and far-reaching of its powers.

Binding Character of Federal Bonds

The provision empowering Congress to borrow money on the credit of the United States is one of that group of powers on which the national banking structure and the currency system of the United States have been based. The power to coin money is another of that group. There was no intimation in the reasoning by which these systems were derived in part from their joint operation that the exercise of either was subject to any limitation resulting from the fact that the other had been

³² *Craig v. Missouri*, 4 Pet. 410, 7 L.Ed. 903. The mere fact that bonds issued by a state on its credit provide that they, and their coupons, shall, upon their respective maturities, be receivable for taxes due the state does not give them the attribute of being designed to circulate as money so as to make them bills of credit within the meaning of this prohibition: *Poindexter v.*

Greenhow, 114 U.S. 270, 5 S.Ct. 903, 29 L.Ed. 185.

³³ *Briscoe v. Bank of Kentucky*, 11 Pet. 257, 9 L.Ed. 709. This decision would prevent the circulating notes of private banks organized under state law from constituting "bills of credit" within the purview of said prohibition.

³⁴ *Veazie Bank v. Fenno*, 8 Wall. 533, 19 L.Ed. 482.

exercised in a particular manner. It has, however, been held that the power to coin money and to regulate its value may not be so exercised as to destroy the obligations assumed by the United States to its bondholders by the bond contract. The power to borrow was held to include that of assuming definite and binding obligations, but not to include that of altering or destroying the obligations thus assumed either by direct repudiation thereof or by so exercising the other powers conferred upon Congress as to produce that result. The statute voiding the gold clause in United States bonds, and providing for the discharge of its obligation by the payment of devalued dollars in an amount equal to the face value of the bonds, was accordingly held invalid as not within any power belonging to Congress. The specific power through which Congress had attempted this repudiation of the obligations of the United States was that of coining money and regulating its value, but the argument is such that the attempt to repudiate by the exercise of any of its other powers would be equally invalid.³⁵ The Supreme Court supported its conclusion by an additional argument based on the provision of the Fourteenth Amendment that "The validity of the public debt of the United States, authorized by law * * * shall not be questioned." The Court admitted that the Congress might validly withdraw the consent of the United States to be sued on its bonds. The bondholder may be denied a remedy, but the obligation owed him by virtue of an exercise of the power to borrow may not be destroyed. This applies as well to the promise to pay as to that relating to the medium of payment.

The grant of the power to borrow contains no specification of the purposes for which money may be borrowed on the credit of the United States. It is, however, an instrumental power in the sense that it is granted as one means for securing the funds re-

³⁵ *Perry v. United States*, 294 U.S. 330, 55 S.Ct. 432, 79 L.Ed. 912, 95 A.L.R. 1335. A bondholder cannot, however, recover without proving actual damages. See the cited case for a discussion of the problem of proving such damages where, by valid legislation, the nation has proscribed the private ownership of gold and its export and seriously restricted foreign exchange operations. For a later discussion of certain aspects of this problem see

Smith v. United States, 302 U.S. 329, 58 S.Ct. 248, 82 L.Ed. 294, 114 A.L.R. 807; see dissenting opinion therein of Mr. Justice Stone for an argument against the view that the power to borrow, when exercised as it had been in the issuance of "gold clause bonds", operates as a limit on the power to regulate the value of money so far as used to affect the medium of their payment and the measurement of the amount due thereon.

quired to finance the execution of the other powers of the national government. The purposes for which it may be exercised are undoubtedly as broad as those for which the taxing power may be exercised. It is improbable that the national government may not finance by borrowing any activities it might finance through taxation "to provide for the general welfare of the United States."

CHAPTER 8

FEDERAL COMMERCE POWER

- 135. General Considerations.
- 136-138. The Meaning of "Interstate Commerce."
- 139. The Meaning of "Regulation of Interstate Commerce."
- 140. How Far Regulation Includes Prohibition.
- 141-144. Extent of Federal Commerce Power.
- 145. Federal Control Over Foreign Commerce.
- 146. Federal Control Over Navigable Waters of the United States.
- 147. Constitutional Limitations Upon Exercises of the Commerce Power.

GENERAL CONSIDERATIONS

135. The Constitution confers upon Congress the power to regulate commerce with foreign nations, among the several states, and with the Indian tribes. The two principal problems to which this grant has given rise are the extent of Congress' power thereunder, and the limitations upon the powers of the several states resulting therefrom.

The federal Constitution contains several provisions that are concerned with the regulation of foreign and interstate commerce, but the most important of them is that which confers upon Congress the power "to regulate commerce with foreign nations, and among the several states."¹ The other applicable provisions deal for the most part with limitations and prohibitions intended to protect such commerce, or some part thereof, against action by the federal government or the states.² The provisions of Section 2 of the Twenty-first Amendment, however, embody a specific, although a limited, prohibition of foreign and interstate commerce in intoxicating liquors.³ These sev-

¹ U.S.C.A.Const. Art. 1, Section 8, Clause 3. This also confers upon Congress the power to regulate commerce with the Indian tribes.

² See U.S.C.A.Const. Art. 1, Section 9, for limitations on the federal government in dealing with foreign and interstate commerce; and U.S.C.A.Const. Art. 1, Section 10, for

limitations on the states in dealing therewith.

³ Said Section 2, U.S.C.A.Const. Amend. 21 reads as follows: "The transportation or importation into any state, territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

eral provisions will be later considered at appropriate points in the subsequent discussion.

The grant to Congress of the power to regulate interstate and foreign commerce has given rise to two quite distinct classes of problems. The first of these has been concerned with what legislation may validly be enacted thereunder by Congress; the other has been concerned with defining the limitations imposed on the powers of the states by the grant to Congress of the power to regulate such commerce. The same classes of questions arise with respect to every grant of power to any of the departments of the federal government. The commerce power is in no sense unique in this respect. Problems of the second type have, however, arisen more frequently in connection with the commerce clause than in connection with any other grant of power to the national government. The result has been the development of a body of judicial decision on this matter that has become so extensive as to merit separate treatment. This will be done in the chapter immediately following the present chapter which will deal exclusively with the scope of the federal government's powers under the commerce clause and the specific and general limitations thereon.

THE MEANING OF "INTERSTATE COMMERCE"

136. The term "commerce" was originally defined as meaning commercial intercourse between nations, and parts of nations, in all its branches, including navigation and transportation as well as buying and selling and the interchange of commodities. The term "interstate commerce" was thus construed to include every such species of commercial intercourse among the states, excluding only the completely internal commerce of a state.
137. The content of the concept of "interstate commerce" has since been extended to include certain forms of non-commercial intercourse among the states, and limited by excluding therefrom certain forms of commercial intercourse among the states, such as insurance.
138. The activities of buying and selling constitute interstate commerce if the contracts therefor contemplate or necessarily involve the movement of goods in interstate commerce.

It is quite impossible to state the law with respect to either of the two problems mentioned in the preceding paragraph with-

out some conception of what constitutes interstate commerce. The reason for this is that that concept is invariably employed in stating the general principles that have been judicially developed in formulating the law in reference to those problems. This does not mean that its content furnishes the sole factor necessary for an understanding of the meaning and scope of those principles, but only that it operates as an essential element in their development and application. A few illustrations may serve to clarify this matter. The Congress may, as part of its power to regulate interstate commerce, regulate transactions that are distinctly not transactions in interstate commerce. The limit on its power to do so is, however, dependent upon the relation of the regulated transaction to interstate commerce. The commerce clause similarly limits a state in regulating what are clearly intrastate transactions, but this is on the theory that the consequences of its regulation thereof impinge upon interstate commerce in a prohibited manner. These examples, moreover, reveal not only the crucial importance of the concept of "interstate commerce" in these fields but also that the solution of the constitutional problems therein cannot be derived by merely developing the implications of that concept. Such solutions are rather the result of a process variously compounded of interpreting the terms of the commerce clause, adopting theories as to its objectives, and weighing considerations of social and economic policy. This latter fact cannot, however, obscure the usefulness of the concept in the statement of those problems and in formulating the principles that have been judicially developed in their solution.

Early Meaning of "Interstate Commerce"

The issue of what transactions and activities constitute interstate commerce was first extensively discussed by the Supreme Court in *Gibbons v. Ogden*.⁴ The decision therein held a state grant of a monopoly to operate steamboats on the navigable waters of New York invalid for conflict with a federal statute licensing the operation of such vessels in the coasting trade. The specific propositions announced therein were that commerce included navigation and that interstate commerce included interstate navigation. Its importance, however, is based on the general discussion in the opinion of the meaning of the general terms of the commerce clause. The term "commerce" is

⁴ 9 Wheat. 1, 6 L.Ed. 23, Black's
Cas. Constitutional Law, 2d, 222.

said to describe "commercial intercourse between nations, and parts of nations, in all its branches", not merely "buying and selling" and the "interchange of commodities", which activities were, however, admitted to be a part thereof. It is in effect asserted that the term "commerce" has the same meaning in the phrase "commerce among the several states" that it has in the phrase "commerce with foreign nations", and that, since in the latter it means "every species of commercial intercourse between the United States and foreign nations", it must in the former refer to every species of commercial intercourse among the states. The grant of federal power to regulate it is specifically stated not to extend to "the completely internal commerce of a state." The latter is also defined as that "carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states."

Interstate Transportation and Activities Connected Therewith

The decisions rendered since *Gibbons v. Ogden* have not only given this concept a measure of definiteness but have also made some important changes therein. The presently prevailing concept can be understood only by considering both. The problem is to indicate, if possible, those factors whose presence will justify the inference that a given activity of a given person constitutes commercial intercourse among the states. Persons engaged in or about the business of transporting goods or persons from state to state, whether by water, land or air, are engaged in interstate commerce with respect to such activity. Those engaged in transmitting intelligence from state to state are similarly engaged regardless of the methods through which the transmission is effected.⁵ A person engaged in transporting goods or persons between points in the same state is engaged in interstate commerce with respect thereto if a part of the route lies within the boundaries of another state,⁶ and in foreign commerce if a part thereof lies without the boundaries of the United States.⁷ It is not essential that the person engaged in

⁵ *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U.S. 1, 24 L.Ed. 708; *International Textbook Co. v. Pigg*, 217 U.S. 91, 30 S.Ct. 481, 54 L.Ed. 678, 27 L.R.A., N.S., 493, 18 Ann.Cas. 1103; *Fisher's Blend Station, Inc. v. State Tax Commission*,

297 U.S. 650, 56 S.Ct. 608, 80 L.Ed. 956.

⁶ *Hanley v. Kansas City Southern Ry. Co.*, 187 U.S. 617, 23 S.Ct. 214, 47 L.Ed. 333.

⁷ *Lord v. Goodall, N. & P. Steamship Co.*, 102 U.S. 541, 26 L.Ed. 224.

interstate transportation in fact carry goods or persons within more than a single state. He is engaged therein though his entire activities are carried on within a single state if he transports within it goods, or persons, destined from the time of their delivery to him, or his acceptance of them as passengers, for points outside that state, or destined to points within it from points outside it from the time of the commencement of the journey of which his route is an integral part, even though he have no definite and permanent through-routing arrangements with any connecting carrier.⁸ The interstate character of his activities of that kind is based on the fact that he performs a part of the transportation services rendered in connection with the interstate movement of such goods or persons. The intention of the shipper of the goods, or of the person being carried, as to their intended destination is the most important single factor in determining whether a given movement of such goods or persons is an integral part of an interstate movement thereof, as well as whether an interstate movement has terminated so as to make a subsequent movement wholly within a single state a new and independent intrastate journey.⁹ The usual course of business is another factor employed in resolving issues of this character.¹⁰ Interstate transportation is deemed to commence when goods or persons begin their final movement for another state in a continuous journey.¹¹ The mere fact that a given movement is an integral part of a larger movement that extends beyond a state's boundaries is not always sufficient to give the former the character of interstate transportation. Hence the movement of ore from the bottom of a mine to its mouth for immediate loading on cars destined for points without the state has been held not to be a part of the interstate journey. It was rather an integral part of the business of mining. Economic considerations implicit in the "usual course of business" test rebutted the inference based on the merely physical fact of continuity of movement.¹² An interstate

⁸ *The Daniel Ball*, 10 Wall. 557, 19 L.Ed. 999.

⁹ *Railroad Commission of Louisiana v. Texas & P. Ry. Co.*, 229 U.S. 336, 33 S.Ct. 837, 57 L.Ed. 1215; *Western Oil Refining Co. v. Lipscomb*, 244 U.S. 346, 37 S.Ct. 623, 61 L.Ed. 1181; *Gulf, C. & S. F. R. Co. v. State of Texas*, 204 U.S. 403, 27 S.Ct. 360, 51 L.Ed. 540.

¹⁰ *Western Union Telegraph Co. v. Foster*, 247 U.S. 105, 38 S.Ct. 438, 62 L.Ed. 1006, 1 A.L.R. 1278.

¹¹ *Coe v. Errol*, 116 U.S. 517, 6 S.Ct. 475, 29 L.Ed. 715.

¹² *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172, 43 S.Ct. 526, 67 L.Ed. 929.

journey, once commenced, continues until the goods or persons being transported have reached the final destination of that journey, and in determining that the intention of the shipper or passenger and the usual course of business are the most important factors.¹³ The unloading of goods that have moved in interstate commerce is itself a part of that movement.¹⁴ The interruption of an interstate movement does not terminate it unless the circumstances show that its purpose is such as would be clearly incompatible with the assumption that the goods or person were still in interstate commerce during the period of the cessation of their movement. An interruption caused by obstacles such as strikes, floods, or the freezing of a water route, would not take the goods out of the stream of interstate transportation.¹⁵ An interruption of an interstate movement for the purpose of enabling the shipper or consignee or another person to deal with them in a manner not immediately connected with the continuation of the interrupted journey terminates that interstate movement.¹⁶ The interstate transportation of goods continues until they are delivered to the consignee or he has had a reasonable period after arrival to accept them, and has been held to include local delivery to the consignee in the case of goods transported in interstate commerce by express companies.¹⁷ It would also include the local transportation services rendered in spotting cars that contain interstate shipments on private sidings and industry tracks. The transportation of a person's own goods from one state into another is interstate commerce whether or not it is part of a business or commercial transaction.¹⁸ The person who is being transported in interstate commerce, or whose goods are being carried therein, is, with respect to those activities, as much en-

¹³ *Western Oil Refining Co. v. Lipscomb*, 244 U.S. 346, 37 S.Ct. 623, 61 L.Ed. 1181; *Western Union Telegraph Co. v. Foster*, 247 U.S. 105, 38 S.Ct. 438, 62 L.Ed. 1006, 1 A.L.R. 1278.

¹⁴ *Rhodes v. Iowa*, 170 U.S. 412, 18 S.Ct. 664, 42 L.Ed. 1088.

¹⁵ *Champlain Realty Co. v. Town of Brattleboro*, 260 U.S. 366, 43 S.Ct. 146, 67 L.Ed. 309, 25 A.L.R. 1195.

¹⁶ *Diamond Match Co. v. Ontonagon*, 188 U.S. 82, 97, 23 S.Ct. 266, 272.

47 L.Ed. 394, 400; *Bacon v. People of State of Illinois*, 227 U.S. 504, 33 S.Ct. 299, 57 L.Ed. 615.

¹⁷ *Barrett v. City of New York*, 232 U.S. 14, 34 S.Ct. 203, 58 L.Ed. 483; cf. *New York ex rel. Pennsylvania R. R. Co. v. Knight*, 192 U.S. 21, 24 S.Ct. 202, 48 L.Ed. 325.

¹⁸ *Pipe Line Cases, United States v. Ohio Oil Co.*, 234 U.S. 548, 34 S.Ct. 956, 58 L.Ed. 1459; *United States v. Hill*, 248 U.S. 420, 39 S.Ct. 143, 63 L.Ed. 337.

gaged in interstate commerce as is the person so transporting him or them.¹⁹

The conduct of transportation frequently involves activities other than the movement of the goods or persons being transported. Some of these are so integral a part of transportation as to be deemed legally a part thereof. Others are more or less closely connected therewith. These include the maintenance by one engaged in interstate commerce of offices for the solicitation of interstate traffic,²⁰ the activities of an independent agency acting in that capacity for interstate carriers,²¹ and the maintenance of offices and conducting other activities solely connected with the interstate movement of articles of commerce.²² The current theory does not treat these activities as themselves constituting interstate commerce, but as being so exclusively in furtherance thereof as to be as fully protected against state action as they would be were they themselves interstate commerce. The making by a carrier of a contract to collect from the consignee of an interstate shipment the price of the goods before their delivery to him is itself interstate commerce.²³ There are, however, services that have to be performed if certain methods for the interstate movement of goods or persons are to be employed whose performance does not render those who perform them engaged in interstate commerce. Those who merely furnish the facilities used in moving goods or persons in interstate commerce, or that are essential to certain methods of such movement, have several times been held not to be engaged in interstate commerce with respect to that activity. The leading cases on this matter have involved corporations maintaining bridges used by others for the interstate and foreign movement of goods and persons.²⁴

¹⁹ *Covington & C. Bridge Co. v. Commonwealth of Kentucky*, 154 U. S. 204, 14 S.Ct. 1087, 38 L.Ed. 962.

²⁰ *Norfolk & W. R. Co. v. Commonwealth of Pennsylvania*, 136 U. S. 114, 10 S.Ct. 958, 34 L.Ed. 394.

²¹ *McCall v. State of California*, 136 U.S. 104, 10 S.Ct. 881, 34 L.Ed. 391; *Texas Transport & Terminal Co. v. City of New Orleans*, 264 U.S. 150, 44 S.Ct. 242, 68 L.Ed. 611, 34 A.L.R. 907; *Di Santo v. Commonwealth of Pennsylvania*, 273 U.S. 34, 47 S.Ct. 267, 71 L.Ed. 524.

²² *Ozark Pipe Line Co. v. Monier*, 266 U.S. 555, 45 S.Ct. 184, 69 L.Ed. 439.

²³ *Rosenberger v. Pacific Express Co.*, 241 U.S. 48, 36 S.Ct. 510, 60 L. Ed. 880.

²⁴ *Henderson Bridge Co. v. Commonwealth of Kentucky*, 166 U.S. 150, 17 S.Ct. 532, 41 L.Ed. 953; *Detroit International Bridge Co. v. Corporation Tax Appeal Board of Michigan*, 294 U.S. 83, 55 S.Ct. 332, 79 L.Ed. 777.

Other Forms of Interstate Commercial Activities as Interstate Commerce

The conception that interstate commerce included all forms of commercial intercourse among the states that seemed implied in some of the Court's language in *Gibbons v. Ogden* has not been fully carried out. Not all forms of commercial intercourse among the states have been held to be a part of interstate commerce. The solicitation of orders, the negotiation, making and carrying out of contracts, buying and selling, and activities incidental to and connected with the foregoing, are among the indispensable activities comprising commercial intercourse. The problem of determining when those engaged therein are engaged in interstate commerce has been judicially considered in innumerable cases. It is not sufficient that the parties to a contract reside in different states. A corporation of one state engaged in another state in entering into insurance contracts with persons therein has invariably been held not to be engaged in interstate commerce in the latter state.²⁵ The Supreme Court has consistently refused to repudiate the principles of *Paul v. Virginia*. Conversely, the mere fact that the parties to a contract are residents of the same state does not prevent their act of making it from being interstate commerce.²⁶ The making of a contract in a given state does not constitute interstate commerce merely because its subject matter is property outside that state and the parties are non-residents,²⁷ nor because it calls for the performance of personal services outside the state in which it is made by residents thereof and is between them and non-residents.²⁸

The decisive factor that renders making a contract an act of interstate commerce is that it contemplates or necessarily involves the movement of goods in interstate commerce, and this test applies whether it be a contract to buy²⁹ or one to sell.³⁰

²⁵ *Paul v. Virginia*, 8 Wall. 168, 19 L.Ed. 357; *Hooper v. People of State of California*, 155 U.S. 648, 15 S.Ct. 207, 39 L.Ed. 297; *New York Life Ins. Co. v. Cravens*, 178 U.S. 389, 20 S.Ct. 962, 44 L.Ed. 1116.

²⁶ *United States Fidelity & Guaranty Co. of Baltimore v. Commonwealth of Kentucky*, 231 U.S. 394, 34 S.Ct. 122, 58 L.Ed. 283.

²⁷ *People of State of New York ex rel. Hatch v. Reardon*, 204 U.S. 152,

27 S.Ct. 188, 51 L.Ed. 415, 9 Ann. Cas. 736.

²⁸ *Williams v. Fears*, 179 U.S. 270, 21 S.Ct. 128, 45 L.Ed. 186.

²⁹ *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 42 S.Ct. 106, 66 L.Ed. 239.

³⁰ *Crenshaw v. State of Arkansas*, 227 U.S. 389, 33 S.Ct. 294, 57 L.Ed. 565.

If making it is an integral part of a course of business that constitutes interstate commerce, making it is itself such.³¹ The same principles should apply to contracts contemplating or necessarily involving the interstate transportation of persons.³² If, however, the contract neither contemplates nor necessarily involves the interstate movement of goods or persons, making it is not a part of interstate commerce.³³ The courts have, in applying these principles, generally held as insufficient the fact that the execution of the contract might incidentally involve such interstate movements.³⁴ The solicitation of orders to be filled by interstate shipments of goods and maintaining an office as an incident thereto, and the negotiation of contracts whose making constitutes interstate commerce, also constitute interstate commerce,³⁵ but the local sale of goods brought into the state in which they are sold from another state is not a part of interstate commerce.³⁶ The question of how far the carrying out of a contract, whose making constituted interstate commerce, is itself interstate commerce depends upon the particular acts performed in its execution. If these merely involve local acts adapted to particular methods of delivering the goods sold in an interstate sale, those acts are deemed interstate commerce.³⁷ If, however, they involve local acts additional to those required for the delivery of such goods, then the local acts are generally held to constitute the transaction of intrastate, and not interstate, commerce.³⁸ The manufacture of goods, even if destined for

³¹ *Lemke v. Farmers' Grain Co. of Embden*, N. D., 258 U.S. 50, 42 S.Ct. 244, 66 L.Ed. 458.

³² See *Williams v. Fears*, 179 U.S. 270, 21 S.Ct. 128, 45 L.Ed. 186.

³³ *Ware & Leland Co. v. Mobile County*, 209 U.S. 405, 28 S.Ct. 526, 52 L.Ed. 855, 14 Ann.Cas. 1031; *Wilcoil Corp. v. Com. of Pennsylvania*, 294 U.S. 169, 55 S.Ct. 358, 79 L.Ed. 838.

³⁴ *Williams v. Fears*, 179 U.S. 270, 21 S.Ct. 128, 45 L.Ed. 186.

³⁵ *Wagner v. City of Covington*, 251 U.S. 95, 40 S.Ct. 93, 64 L.Ed. 157, 168; *Cheney Bros. Co. v. Commonwealth of Massachusetts*, 246 U.S. 147, 38 S.Ct. 295, 62 L.Ed. 632.

³⁶ *Wagner v. City of Covington*, 251 U.S. 95, 40 S.Ct. 93, 64 L.Ed. 157, 168.

³⁷ *Caldwell v. State of North Carolina*, 187 U.S. 622, 23 S.Ct. 229, 47 L.Ed. 336; *Stewart v. People of State of Michigan*, 232 U.S. 665, 34 S.Ct. 476, 58 L.Ed. 786; *Rearick v. Pennsylvania*, 203 U.S. 507, 27 S.Ct. 159, 51 L.Ed. 295.

³⁸ *Browning v. Waycross*, 233 U.S. 16, 34 S.Ct. 578, 58 L.Ed. 828; *General Ry. Signal Co. v. Virginia ex rel. State Corporation Commission*, 246 U.S. 500, 38 S.Ct. 360, 62 L.Ed. 854. Cf. *York Mfg. Co. v. Colley*, 247 U.S. 21, 38 S.Ct. 430, 62 L.Ed. 963, 11 A.L.R. 611, and *Davis v. Commonwealth of Virginia*, 236 U.S. 697, 35 S.Ct. 479, 59 L.Ed. 795.

shipment to other states, is not itself interstate commerce.³⁹ The principal form of commercial intercourse between persons in different states which has been held not to constitute interstate commerce, and which might well have been held to be such, is the making of contracts of insurance between residents of different states.⁴⁰

Non-commercial Activities as Interstate Commerce

An important modification of the definition of interstate commerce enunciated in *Gibbons v. Ogden* has been the removal of the requirement that the intercourse among the states be of a commercial character. The leading cases in which this change has been effected have involved federal legislation. The Mann White Slave Act prohibiting the interstate transportation of women for immoral purposes has been sustained as applied to a case involving no commercial aspects as far as the party charged with the illegal transportation was concerned.⁴¹ A person transporting his own liquor on his person from one state into another for his own use thereof in the latter state is engaged in interstate commerce with respect thereto although his own activities in so doing completely lacked any commercial character.⁴² Activities of the foregoing character would scarcely be called commercial merely because the persons charged with the illegal transportation of the women or the intoxicating liquors had engaged in a commercial transaction with the common carrier over whose railroad the transportation occurred. It has also been stated that non-commercial intercourse between states would be interstate commerce where the question involved is the validity under the commerce clause of state action affecting it, and this is clearly sound doctrine.⁴³ The factor that appears to be requisite in order that activities or transactions constitute interstate commerce is that there be an actual interstate movement of goods or persons, or that the transaction contemplates or necessarily involves such movement. The same principles, mutatis

³⁹ *Kidd v. Pearson*, 128 U.S. 1, 9 S.Ct. 6, 32 L.Ed. 346.

⁴⁰ Cf. with the insurance cases *International Textbook Co. v. Pigg*, 217 U.S. 91, 30 S.Ct. 481, 54 L.Ed. 678, 27 L.R.A., N.S., 493, 18 Ann.Cas. 1103.

⁴¹ *Caminetti v. United States*, 242

U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442, L.R.A.1917F, 502, Ann.Cas.1917B, 1168.

⁴² *United States v. Hill*, 248 U.S. 420, 39 S.Ct. 143, 63 L.Ed. 337.

⁴³ *Covington & C. Bridge Co. v. Commonwealth of Kentucky*, 154 U.S. 204, 14 S.Ct. 1087, 38 L.Ed. 962.

mutandis, would apply in determining whether a given activity or transaction constituted foreign commerce.

THE MEANING OF "REGULATION OF INTERSTATE COMMERCE"

139. To regulate interstate commerce is to prescribe the rule by which it shall be governed. The power to regulate it, however, includes much more than that of prescribing such rule for transactions and activities that are themselves a part of interstate commerce. Furthermore, there are certain situations in which the prescribing of a rule to govern interstate commerce is not deemed a regulation thereof within the constitutional meaning of that term.

It has already been stated that the extent of Congress' power under the commerce clause is not limited to the regulation of those activities and transactions that constitute interstate commerce as that concept has been delimited by judicial decision. The two principal classes of problem that have arisen in defining the extent of that power have been whether it includes every regulation of those activities and transactions that are interstate commerce as heretofore defined, and how far those activities and transactions that are not interstate commerce as thus defined may be regulated thereunder. The subsequent discussion will show that the scope of the federal commerce power cannot be defined by a synthesis of the judicial definitions of the several terms in which the grant thereof is phrased. It has, for example, been stated that the power to regulate interstate commerce meant that of prescribing the rule by which it was to be governed.⁴⁴ It would, however, be a wholly erroneous statement of the extent of that power if the term "interstate commerce", as therein used, were restricted to the meanings that have been given it by the judicial decisions heretofore examined. Cases that will be later considered show that a great mass of congressional legislation has been held to be a "regulation of interstate commerce" which was clearly not prescribing a rule to govern those types of activities and transactions that other decisions hold to constitute interstate commerce, but which prescribed a rule to govern matters that were clearly intrastate commerce. A regulation of intrastate rates may, for example, constitute a

⁴⁴ GIBBONS v. OGDEN, 9 Wheat. 1, 6 L.Ed. 23, Black's Cas. Constitutional Law, 2d, 222.

regulation of interstate commerce within the meaning of the Constitution.⁴⁵ This paradox might, perhaps, be avoided if the concept of interstate commerce were expanded to include any activity or transaction whose consequences or effects extended to more than a single state. The application of such a conception to the complex interrelations existing in a nationally integrated economic system would involve an expansion of the concept of interstate commerce beyond that actually found in judicial opinion. This, however, does not mean that some of the ideas implicit in such a conception have not contributed to the judicial definition of the scope of the federal commerce power. They have in fact exerted an influence thereon as elements in determining whether the regulation of a matter that did not come within the narrower conception of interstate commerce was so directly related to matters within that conception as to make the regulation a valid exercise of Congress' power to regulate interstate commerce. It is impossible to state how far this difference in the theory of their recognition has affected the course of judicial decision on the scope of the commerce power.

HOW FAR REGULATION INCLUDES PROHIBITION

140. The power to regulate interstate commerce includes that of prohibiting the movement of goods and persons in interstate commerce. The prohibition may be either absolute or limited and conditional. There are, however, limits to this power based both on the commerce clause itself and on the necessity for preventing it from being used to invade the powers reserved to the states by the Tenth Amendment to the Constitution of the United States. The line between the permissible and prohibited exercises of this power of prohibition is not precise, and today many prohibitions are being sustained that would most probably have been held invalid during earlier periods.

The normal and natural construction of a grant of power to regulate interstate commerce would suggest that it included at least that of prescribing the rule to govern any of the transactions or activities constituting interstate commerce in its judicially accepted sense. The immediate field in which such regulation operates is that of interstate commerce. The general course of decision has sustained legislative regulations of that

⁴⁵ *Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co.*, 257 U.S. 563, 42 S.Ct. 232, 66 L.Ed. 371, 22 A.L.R. 1086.

character. The majority of the decisions dealing with it have involved legislation governing the interstate movement of goods and persons. The specific decisions will be later noted. The power to control the interstate movement of goods and persons, if unlimited, would imply a power indirectly to control a great field of transactions and activities not immediately involved in that of the interstate transportation of goods and persons. It is this that has given rise to the problem of whether the commerce clause confers upon Congress the power to prescribe any and every character of regulation governing interstate transportation provided that it does not conflict with the specific or general limitations upon the exercise of federal legislative powers generally. The issue has almost always arisen in connection with federal legislation prohibiting the interstate transportation of certain goods or persons either absolutely or conditionally. The objections that have generally been urged against such legislation have been that the power to regulate did not include that of prohibiting interstate commerce, and that the particular prohibitions involved exceeded the grant of power made by the commerce clause and infringed upon the powers reserved to the states by the Tenth Amendment. The contentions based upon that Amendment are most often urged as an argument distinct from the argument that the terms of the grant of the power do not include the particular prohibitions involved in the cases, but it may well be doubted that it constitutes anything more than an alternative method for formulating the claim that the terms of the commerce clause do not include the power to prescribe those prohibitions.

Prohibition as a Form of Regulation

It can no longer be maintained that a regulation of interstate commerce is invalid merely because it takes the form of an absolute or qualified prohibition of the interstate transportation of particular goods or persons.⁴⁶ Legislation of that character has been sustained in so many instances as to deprive that position of the doubtful plausibility once attributed to it. The first legislation of that kind which was sustained was that prohibit-

⁴⁶ The term "invalid" as used throughout the discussions of this chapter means, unless the contrary is specifically indicated, "not within the powers granted to Congress by the commerce clause," and the

term "valid" means "within those powers." The validity or invalidity of legislation under other provisions of the Constitution is not considered in this chapter unless the contrary is specifically indicated.

ing the interstate transportation of lottery tickets.⁴⁷ It was held that Congress had the power to forbid the use of the instrumentalities and channels of interstate commerce to articles "confessedly injurious to the public morals" in order to supplement and protect the policy of such of the states as had made lotteries illegal. It was recognized that this power might not be exercised to defeat the objects for the accomplishment of which the power to regulate interstate commerce had been conferred upon Congress. The exertion of the same power of completely excluding them from the channels of interstate commerce was later sustained as applied to impure foods and drugs,⁴⁸ women being transported for immoral purposes,⁴⁹ diseased plants,⁵⁰ stolen motor vehicles,⁵¹ and kidnapped persons.⁵²

Limited or qualified prohibitions have also been sustained. This method received its first important application in connection with the interstate transportation of intoxicating liquors. It was adopted in aid of the enforcement of the local policy of those states that had prohibited the manufacture and sale of intoxicating liquors within their boundaries. The commerce clause was construed to prevent the states by their own sole action from prohibiting the solicitation within them of orders for intoxicants to be shipped into them from points outside the state and the subsequent delivery within them of the goods thus ordered.⁵³ It was also construed to protect the local sale in the original package of intoxicants brought in from points outside a state for such sale therein.⁵⁴ The effect of such constructions of the commerce clause was to interpose serious barriers to the accomplishment of the objectives aimed at by the prohibitory legislation of those states that had adopted the policy of prohibition. The Congress came to their assistance by a series of enactments commencing with the Wilson Act, 27 U.S.C.A. § 121, and ending with

⁴⁷ Lottery Case, *Champion v. Ames*, 188 U.S. 321, 23 S.Ct. 321, 47 L.Ed. 492.

⁴⁸ *Hipolite Egg Co. v. United States*, 220 U.S. 45, 31 S.Ct. 364, 55 L.Ed. 364.

⁴⁹ *Hoke v. United States*, 227 U.S. 308, 33 S.Ct. 281, 57 L.Ed. 523, 43 L.R.A.,N.S., 906, Ann.Cas.1913E, 905.

⁵⁰ *Oregon-Washington R. & Nav. Co. v. State of Washington*, 270 U.S. 87, 46 S.Ct. 279, 70 L.Ed. 482.

⁵¹ *Brooks v. United States*, 267 U.S. 432, 45 S.Ct. 345, 69 L.Ed. 699, 37 A.L.R. 1407.

⁵² *Bailey v. United States*, 10 Cir., 74 F.2d 451; *Kelly v. United States*, 10 Cir., 76 F.2d 847.

⁵³ *Bowman v. Chicago & N. W. Ry. Co.*, 125 U.S. 465, 8 S.Ct. 689, 31 L.Ed. 700.

⁵⁴ *Leisy v. Hardin*, 135 U.S. 100, 10 S.Ct. 681, 34 L.Ed. 128.

the Reed Amendment to the Webb-Kenyon Act, 27 U.S.C.A. § 122. The first of these made intoxicating liquors subject to state prohibitory statutes upon their arrival in such states, and was sustained as applied to an original package sale of intoxicants introduced from another state.⁵⁵ The Webb-Kenyon Act and the Reed Amendment thereto in substance prohibited the interstate transportation of intoxicants into states that had adopted the policy of prohibition with respect thereto. Both were sustained as valid exercises of the power to regulate interstate commerce.⁵⁶ The most recent application of the method developed in the Congressional legislation dealing with intoxicants has been to prison made goods. Legislation following the lines of the Wilson Act was sustained with the result that a state law prohibiting their sale within it was held valid as applied to their sale in the original package.⁵⁷ Legislation following the lines of the Webb-Kenyon Act was subsequently also held a valid exercise of the federal commerce power as applied to such goods.⁵⁸

Limits on Power to Prohibit Interstate Commerce

The power to prohibit interstate transportation has not only not been held to be unlimited but has been affirmatively held to be limited. The leading case so holding is that of *Hammer v. Dagenhart*.⁵⁹ The statute held invalid therein prohibited the interstate transportation of manufactured goods produced in a factory in which, within thirty days prior to their removal therefrom, children under the age of fourteen had been employed or permitted to work, or children between the ages of fourteen and sixteen had been employed or permitted to work for more than eight hours in any one day, or for more than six days per week, or after 7 P. M. or before 6 A. M. The exclusion of the goods from interstate commerce was in no sense dependent upon proof

⁵⁵ *In re Rahrer*, 140 U.S. 545, 11 S.Ct. 865, 35 L.Ed. 572.

⁵⁶ *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U.S. 311, 37 S.Ct. 180, 61 L.Ed. 326, L.R.A.1917B, 1218, Ann.Cas.1917B, 845 (Webb-Kenyon Act, 27 U.S.C.A. § 122); *United States v. Hill*, 248 U.S. 420, 39 S.Ct. 143, 63 L.Ed. 337 (Reed Amendment, 27 U.S.C.A. § 1 note, 18 U.S.C.A. § 341).

⁵⁷ *WHITFIELD v. STATE OF*

OHIO, 297 U.S. 431, 56 S.Ct. 532, 80 L.Ed. 778, Black's Cas. Constitutional Law, 2d, 293.

⁵⁸ *KENTUCKY WHIP & COLLAR CO. v. ILLINOIS CENT. R. CO.*, 299 U.S. 334, 57 S.Ct. 277, 81 L.Ed. 270, Black's Cas. Constitutional Law, 2d, 230.

⁵⁹ 247 U.S. 251, 38 S.Ct. 529, 62 L.Ed. 1101, 3 A.L.R. 649, Ann.Cas. 1918E, 724.

that children had actually been employed in violation of the provisions of the statute in the production of the specific goods excluded from interstate transportation. The statute was held invalid not only as transcending the grant to Congress of power to regulate interstate commerce but also as an attempt to regulate a purely local matter the regulation of which was not within the competence of the federal government. The basis for the latter position was that its aim and necessary effect were the regulation of child labor engaged in local industry, a matter stated to lie wholly within the exclusive competence of the several states. Prior decisions sustaining federal statutes excluding certain goods and persons from interstate transportation were distinguished on the score that they involved situations in which interstate transportation had been necessary to the accomplishment of harmful results, and that element was said to be absent in the instant case. The majority of the Court did not consider as such an evil what it described as the "unfair competition" in the national markets of those states whose local laws as to child labor did not meet what Congress deemed the more just standard of other states. A dissenting opinion by Mr. Justice Holmes asserted the position that the possible reaction of the legislation upon the conduct of the several states should not invalidate what was, as measured by its immediate subject matter and field of operations, a clear regulation of interstate commerce. The case presents another instance in which the validity of an exercise of federal powers is determined not by what it immediately provides for but by its more ultimate effects within a field of action in which the states possess an undeniable power to act.

A decision that specific federal action of this character is invalid cannot logically be based on the mere occurrence of those ultimate effects since the very fact that the interstate transportation of goods or persons is prohibited or restricted is almost certain to produce some effects of that character whether the regulation be invalid or valid. The view that it is valid only when the prohibition or restriction prevents such interstate transportation as is necessary for the accomplishment of harmful results makes validity or invalidity a function of indefinite and elusive conceptions of what constitute evils. Nor can the differences between the two lines of decision be explained by the theory that Congress may prohibit or restrict interstate transportation to aid a state in the promotion of a valid state policy but not to subject it to pressure to adopt a policy that it has chosen not to

adopt, since the same legislation will often aid the policy of one state and operate as a pressure device upon another. The factor whose presence results in rendering legislation of this character an invalid exercise of the commerce power is that its primary aim is to enforce federal regulation of matters which it could not directly regulate but the direct regulation of which lies within the exclusive competence of the states.⁶⁰ The application of this principle is exceedingly difficult since it depends upon judicial judgments as to the primary aims of Congress in enacting legislation. Its scope is bound to diminish with the expansion of the area within which direct federal regulation of matters in or affecting interstate commerce is permitted. That this area is being judicially expanded is evident from the recent decisions sustaining the National Labor Relations Act as applied to a variety of production activities.⁶¹ The case of *Hammer v. Dagenhart* has, however, never been expressly over-ruled, and the principle last stated continues, and is likely to continue, a barrier to an unrestricted Congressional resort to the method of prohibiting or restricting the interstate transportation of goods and persons as a means for promoting the acceptance by the states of Congressional views on the policy that they should adopt with respect to matters clearly within their competence to regulate. The present trend is in the direction of narrowing the scope of the principle rather than in that of wholly denying its existence.

The existence of the limitation on the power of Congress to forbid or restrict interstate transportation that has just been discussed does not necessarily imply the absence of other limitations thereon which are based upon the commerce clause itself. The view that such others exist must be based upon implications derivable from expressions found in opinions rendered in cases decided on theories other than that regulation could not in all instances take the form of prohibition. It was stated in the prevailing opinion in *Hammer v. Dagenhart* that prior decisions sustaining both federal and state prohibitions of interstate trans-

⁶⁰ This principle is impliedly recognized by the Supreme Court in distinguishing *Hammer v. Dagenhart* from *KENTUCKY WHIP & COLLAR CO. v. ILLINOIS CENT. R. CO.*, *supra*, in the opinion in the latter case.

⁶¹ NATIONAL LABOR RELA-

TIONS BOARD *v.* JONES & LAUGHLIN STEEL CORP., 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893, 108 A.L.R. 1352, Black's Cas. Constitutional Law, 2d, 247; *National Labor Relations Board v. Fruehauf Trailer Co.*, 301 U.S. 49, 57 S.Ct. 642, 81 L.Ed. 918, 108 A.L.R. 1352.

portation rested "upon the character of the particular subjects dealt with and the fact that the scope of governmental authority, state or national, possessed over them is such that the authority to prohibit is as to them but the exertion of the power to regulate." The opinion in the Webb-Kenyon Act decision⁶² contains similar intimations that the character of the article is an important factor in determining when the regulation of interstate commerce may validly assume the form of a prohibition or restriction of its interstate transportation.⁶³ It has also been stated that the power to prohibit interstate transportation might not be exercised to defeat the objects for the accomplishment of which the power to regulate interstate commerce had been conferred upon Congress.⁶⁴ These vague intimations clearly warrant an inference that there may arise cases in which a prohibition of interstate transportation may not constitute a regulation of interstate commerce within the constitutional meaning of that phrase even though the power has not been exercised for the indirect regulation of local matters that could not be directly regulated by Congress, and that the character of the excluded article and the purposes aimed at by its exclusion are the important factors that will determine the decision thereon. The reference in *Hammer v. Dagenhart* to the fact that the excluded articles were in themselves harmless gives a faint clue as to the meaning of the former of these factors, although the harmless character of the excluded article does not alone suffice to render its exclusion invalid.⁶⁵ The state of the decisions in the light of the reasoning employed in the opinions therein does not warrant any definite statement as to the law on the issue raised in this paragraph.

⁶² *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U.S. 311, 37 S.Ct. 180, 61 L.Ed. 326.

188 U.S. 321, 23 S.Ct. 321, 47 L.Ed. 492.

⁶³ It should be noted that some of the language of these opinions might warrant an inference that the need for considering this factor was based not on the terms of the commerce clause but on that of some of the constitutional guaranties. These, however, are not invariably referred to when this factor is mentioned.

⁶⁴ *Lottery Case, Champion v. Ames*,

⁶⁵ See opinion of Hughes, Ch.J., in *KENTUCKY WHIP & COLLAR CO. v. ILLINOIS CENT. R. CO.*, 299 U.S. 334, 57 S.Ct. 277, 81 L.Ed. 270, *Black's Cas. Constitutional Law*, 2d, 230. See, also, remarks of Mr. Chief Justice White in *Wilson v. New*, 243 U.S. 332, 37 S.Ct. 298, 61 L.Ed. 755, *L.R.A.1917E*, 938, *Ann.Cas.1918A*, 1024, that the "right to prohibit could not be applied to pig iron, steel rails, or most of the vast body of commodities."

Interstate Commerce Power and Existence of Federal Police Power

The decisions sustaining the prohibition or restriction of the interstate transportation of goods and persons may safely be assumed to have decided that the legislation involved in them did not transcend either those limits on the commerce power implicit in the conception of what constitutes regulation or those based on the principle that the power may not be so exercised as to invade the reserved powers of the states. The reasons invoked to sustain such legislation thus furnish the most important single basis for measuring the validity of any future prohibitions or restrictions on such transportation. It is now established that Congress may exercise its commerce power by enacting legislation having the quality of police regulations, and that, in so doing, "it is exercising the police power, for the benefit of the public, within the field of interstate commerce."⁶⁶ It may, therefore, protect the public against evils arising within or connected with interstate commerce, including the interstate transportation of goods or persons. The evils against which it may protect such commerce may arise from the character of the goods whose transportation is prohibited. It is on this basis that the interstate transportation of impure foods and drugs may be prohibited.⁶⁷ The power to prohibit may also be exercised to prevent the channels of interstate commerce from being used to accomplish purposes that Congress is free to regard as evils. The prohibition of the interstate transportation of lottery tickets and of women for immoral purposes has been sustained for such reason.⁶⁸ It may also be exercised to prevent the channels of such commerce from being used to defeat the valid laws enacted by the states for the protection of persons or property within their borders. This has thus far been used only to protect the state of destination of goods moving in interstate commerce. It has been sus-

⁶⁶ *Brooks v. United States*, 267 U. S. 432, 45 S.Ct. 345, 69 L.Ed. 690, 37 A.L.R. 1407.

⁶⁷ *Hipolite Egg Co. v. United States*, 220 U.S. 45, 31 S.Ct. 364, 55 L.Ed. 364.

⁶⁸ *Lottery Case, Champion v. Ames*, 188 U.S. 321, 23 S.Ct. 321, 47 L.Ed. 492; *Hoke v. United States*, 227 U.S.

308, 33 S.Ct. 281, 57 L.Ed. 523, 43 L. R.A., N.S., 906, Ann.Cas.1913E, 905. See, also, *Electric Bond & Share Co. v. Securities & Exchange Commission*, 2 Cir., 92 F.2d 580, sustaining an act prohibiting the use of the mails and the facilities of interstate commerce as part of a system for the control of public utility holding companies operating or controlling subsidiaries in more than a single state.

tained in the case of intoxicating liquors and prison-made goods.⁶⁹ The decisions assumed that the states had the constitutional power to prohibit traffic in the articles to which the federal prohibition related. It has not been determined whether this principle would apply to articles the traffic in which the states could not validly prohibit. Nor has it been authoritatively determined whether it would permit Congress by this means to co-operate with the states in enforcing their policies with respect to the interstate movement of goods originating within them so far as they could themselves validly control either the local movement or production of such goods.⁷⁰

The power of Congress to prohibit or restrict interstate transportation in order to give effect to any valid policies that it may adopt in relation to interstate commerce generally is clearly established. It may, for example, prohibit railroads to carry in interstate commerce a commodity directly or indirectly owned by the carrier while it is being transported in such commerce where this is part of its program to prevent the use of the instrumentalities of interstate commerce for the creation of monopolies that might burden such commerce.⁷¹ There is no reason to believe that it may not also use this power to promote objectives within the range of its powers other than the commerce power. The limit to its power to prohibit or restrict interstate transportation thus ultimately depends upon what are the valid objectives for which it may exercise its several powers.⁷² The recent trend in increasing the scope of its control over local matters because of their relation to interstate commerce has undoubtedly increased the area within which prohibitions or restrictions of interstate transportation will be upheld. The net result may be summarized in the statement that

⁶⁹ *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U.S. 311, 37 S.Ct. 180, 61 L.Ed. 326 (liquors); *KENTUCKY WHIP & COLLAR CO. v. ILLINOIS CENT. R. CO.*, 299 U.S. 334, 57 S.Ct. 277, 81 L.Ed. 270, 33 Black's Cas. Constitutional Law, 2d, 230 (prison-made goods).

⁷⁰ See, however, *Ryan v. Amazon Petroleum Corp.*, 5 Cir., 71 F.2d 1, 8 (sustaining a statute authorizing the President to prohibit the transportation in interstate commerce of oil produced in excess of amount per-

mitted by a valid state regulation thereof.

⁷¹ *United States v. Delaware & Hudson R. Co.*, 213 U.S. 366, 29 S.Ct. 527, 53 L.Ed. 836.

⁷² See in this connection *Moor v. Texas & N. O. R. Co.*, 5 Cir., 75 F.2d 386 (sustaining a statute prohibiting the transportation of cotton in interstate commerce beyond the boundaries of the county of its production unless bearing tags evidencing its exemption from a federally imposed tax or its payment).

a prohibition or restriction of interstate transportation is a valid exercise of the commerce clause if its purpose is the prevention of evils of the character above referred to, or the cooperation with the states to prevent the use of the channels of interstate commerce to defeat their valid local policies, or the promotion of any valid policy for which Congress may exercise its commerce or other powers. A prohibition or restriction that can be sustained on any of those bases is not only a regulation of interstate commerce in the constitutional sense of that phrase but also does not violate the principle against trenching upon the powers reserved to the states. It may also be noted that the problem of the extent to which Congress may exercise its power to regulate interstate commerce by prohibiting or restricting interstate transportation is but a specific instance of the more general problem of the extent to which it may exercise that power of regulation by prohibiting or restricting any activity or transaction constituting interstate commerce or which is so closely related to interstate commerce as to be within the federal commerce power.

EXTENT OF FEDERAL COMMERCE POWER

141. The Congress has the power to provide for the creation of the facilities and instrumentalities of interstate commerce, either through private or federal governmental action, and to protect them against obstructions arising from any source whatever.
142. It may also regulate the activities of those engaged in interstate navigation or transportation in any manner appropriate for the protection or promotion of interstate commerce. This includes the power of regulating even their intrastate activities so far as that is an appropriate means for securing those objectives.
143. It may enact legislation for the purpose of affirmatively promoting the development of an adequate national system of transportation to care for the nation's interstate commerce.
144. It may legislate to protect interstate commerce against interference or obstruction imposing a direct burden upon it, and it is the existence of the obstruction or threat thereof, and not its source, that defines the limits on Congress' powers in this matter.

Provision of Instrumentalities of Interstate Commerce

The power to regulate interstate commerce was not exercised by Congress to any great extent during the early period of the nation's life. It was not until the nation had expanded and the development of methods of transportation had transformed it into an integrated economic whole that Congress began to make extensive use of this power. It then became the source of some of the most important legislation enacted by Congress, and bids fair to assume an even more important role in developing the centralizing tendency now prevailing in governmental practices within the United States. It would be interesting and enlightening to trace the historical growth of the importance of the commerce clause as the source of Congressional legislation but the purposes of the present treatise demand a basis of grouping the data on a basis other than the historical. The commerce clause was one of the principal bases relied upon by Congress in authorizing the construction of the system of national highways to connect the states bordering on the Atlantic coast with the developing western country. The soundness of this position was subsequently vindicated by decisions holding that the commerce power may be exercised to legislate for the provision of the facilities and instrumentalities of interstate commerce and transportation. Congress may authorize the construction of railroads and bridges to be used as facilities for interstate commerce, may create corporations to do so, and in that connection confer upon those authorized to create such facilities the power to condemn property required therefor.⁷³ The federal government itself may be authorized to construct such instrumentalities, and extensive internal improvements have in fact been constructed by it.⁷⁴

The navigable waterways of the United States constitute an important factor in the interstate transportation system of the United States. The commerce clause empowers Congress not only to maintain and improve their navigability by positive federal action⁷⁵ but also to guard them against obstructions

⁷³ LUXTON v. NORTH RIVER BRIDGE CO., 153 U.S. 525, 14 S.Ct. 891, 38 L.Ed. 808, Black's Cas. Constitutional Law, 2d, 236; State of California v. Central Pac. R. Co., 127 U.S. 1, 8 S.Ct. 1073, 32 L.Ed. 150.

⁷⁴ State of California v. Central

Pac. R. Co., 127 U.S. 1, 8 S.Ct. 1073, 32 L.Ed. 150.

⁷⁵ ASHWANDER v. TENNESSEE VALLEY AUTHORITY, 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 688, Black's Cas. Constitutional Law, 2d, 261.

whether due to the acts of private persons or state agencies and instrumentalities. It may prohibit the construction, alteration or maintenance of bridges across those rivers that are a part of the navigable waters of the United States in order to prevent obstruction of interstate commerce thereon, even though this may involve the destruction of bridges constructed under authority of state law.⁷⁶ It may, however, equally authorize their construction and maintenance across such rivers, and condition the right to construct or maintain them on procuring consent thereto from designated federal officials.⁷⁷ The same principles apply to the construction and maintenance of structures such as wharves in such navigable waters.⁷⁸ The right to use the water of such navigable rivers and lakes may be prohibited, limited, or conditioned upon procuring the consent of designated federal authorities. The right of the state in which such waters are found to determine how they shall be used is subordinate to that of the national government to control that matter for the purposes of protecting their use as channels for interstate or foreign commerce. It has, for example, been held that their use by a municipality in connection with its disposal of its sewage may be conditioned upon procuring federal assent and limited in amount to that determined by federal authority.⁷⁹ This power of the federal government to remove obstructions to interstate and foreign commerce, and that of promoting such commerce by increasing the navigable capacity of such waters, is superior to that of the states to provide for the welfare and necessities of their people.⁸⁰ It justifies such measure of control over the non-navigable tributaries of navigable waters of the United States as may be necessary and proper to the regulation of the use and flow of the waters in the latter.⁸¹ A great many of these matters may, however, be regulated by the states in the absence of federal legislation, including such matters as the construction of bridges,

⁷⁶ *Wheeling Bridge Case*, *Pennsylvania v. Wheeling & B. Bridge Co.*, 13 How. 518, 14 L.Ed. 249.

⁷⁷ *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 How. 421, 15 L.Ed. 435; *Union Bridge Co. v. United States*, 204 U.S. 364, 27 S.Ct. 367, 51 L.Ed. 523; *President, etc., of Monongahela Bridge Co. v. United States*, 216 U.S. 177, 30 S.Ct. 356, 54 L.Ed. 435.

⁷⁸ *Philadelphia Co. v. Stimson*, 223 U.S. 605, 32 S.Ct. 340, 56 L.Ed. 570.

⁷⁹ *Sanitary District of Chicago v. United States*, 266 U.S. 405, 45 S.Ct. 176, 69 L.Ed. 352.

⁸⁰ *State of New Jersey v. Sargent*, 269 U.S. 328, 46 S.Ct. 122, 70 L.Ed. 289.

⁸¹ *Appalachian Electric Power Co. v. Smith*, D.C., 4 F.Supp. 6.

dams, and aids to navigation.⁸² The exercise of the federal power, however, supersedes these so far as any conflict occurs between them.

Regulation of Interstate Transportation

The principal legislation enacted by Congress concerning the instrumentalities of interstate commerce has dealt with the regulation of the privately owned and operated common carriers engaged in interstate transportation. There has been a gradual but continuous expansion of this field of regulation by way of increasing both the kinds of transportation subjected thereto and the types of control applied to them. Some of this legislation was accepted as constitutional without question, and most of that whose validity was assailed was ultimately sustained. The early legislation was chiefly concerned with regulating the relations between carriers and shippers, and aimed primarily at preventing the former from making undue and unreasonable discriminations among the latter. These provisions prohibiting unreasonable discriminations of various kinds were sustained with respect to interstate shipments.⁸³ The rates for the interstate transportation of goods may be fixed by Congress or by a commission upon which it has conferred the power to do so.⁸⁴ This includes the power to fix not only maximum rates in order to prevent extortion but also minimum rates in order to prevent unfair discrimination. The interests of interstate shippers in the matter of rates may also be protected by prohibiting agreements among carriers aimed at monopolistic rate-making practices by them in respect of interstate rates.⁸⁵ Their convenience may be served by prescribing the rules of liability of carriers with respect to the interstate carriage of goods and imposing upon the initial carrier liability for damages to the goods caused by a connecting carrier who is required to recoup the initial carrier therefor.⁸⁶ Congress may impose upon

⁸² *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U.S. 678, 2 S.Ct. 185, 27 L.Ed. 442; *Pigeon River Improvement, Slide & Boom Co., Etc., v. Charles W. Cox*, 291 U.S. 138, 54 S.Ct. 361, 78 L.Ed. 695.

⁸³ *New York Cent. & H. R. R. Co. v. United States*, 212 U.S. 481, 29 S.Ct. 304, 53 L.Ed. 613.

⁸⁴ *St. Louis Southwestern R. Co. v.*

United States, 245 U.S. 136, 38 S.Ct. 49, 62 L.Ed. 199.

⁸⁵ *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 19 S.Ct. 25, 43 L.Ed. 259.

⁸⁶ *Adams Express Co. v. Croninger*, 226 U.S. 491, 33 S.Ct. 148, 57 L.Ed. 314, 44 L.R.A.,N.S., 257; *Atlantic Coast Line R. Co. v. Riverside Mills*,

those engaged in rendering interstate transportation services the duty to provide adequate facilities therefor, and require them to establish through routes and joint rates applicable to interstate shipments.⁸⁷ It may authorize the establishment of rules for the distribution of equipment among interstate shippers.⁸⁸ There is in fact no aspect of the relation of an interstate carrier to the interstate shipper of goods or the interstate passenger that may not be regulated by Congress under its commerce power. This is equally true of the relations of the telephone and telegraph companies to those using their facilities for the interstate transmission of intelligence. The activities of those who furnish facilities used in connection with interstate transportation may also be regulated so far as they furnish such facilities, even though they themselves may not be engaged in interstate commerce.⁸⁹ So far as it is a question of the scope of the commerce power it is immaterial whether the carriers engaging in interstate transportation are common, private, or contract carriers, although that is a factor in determining the validity of their regulation under the due process clause of the Fifth Amendment.

Federal Regulation of Intrastate Activities

The mere fact that a person engages in the business of interstate transportation does not subject all of his activities and affairs to federal regulation. However, the power of Congress over his activities is not limited to such part thereof as constitutes interstate commerce. The effective control of his interstate transportation will frequently require some regulation of his other activities that may be closely related thereto or even inextricably interwoven therewith. The promotion of safety in conducting the interstate operations of carriers by rail justifies federal legislation requiring the observance of safety measures and equipping cars and locomotives with prescribed safety devices. The purpose of such laws might be either partly or wholly defeated if not made applicable to equipment employed in intrastate transportation. It is, therefore, valid for Congress to protect interstate commerce by requiring equipment used

219 U.S. 186, 31 S.Ct. 164, 55 L.Ed. 167, 31 L.R.A.,N.S., 7.

⁸⁷ St. Louis Southwestern R. Co. v. United States, 245 U.S. 136, 38 S. Ct. 49, 62 L.Ed. 199.

⁸⁸ United States v. New River Co., 265 U.S. 533, 44 S.Ct. 610, 68 L.Ed. 1165.

⁸⁹ Stafford v. Wallace, 258 U.S. 495, 42 S.Ct. 397, 66 L.Ed. 735, 23 A.L.R. 229.

in intrastate commerce to be provided with the same safety devices as those required in interstate transportation.⁹⁰ Effective control over interstate rates will at least be promoted by requiring carriers to keep their accounting records in accordance with some uniform system, and Congress may authorize public officials to prescribe such a system even though keeping accounts of interstate activities is not interstate commerce. The realization of the purposes for subjecting such carriers to governmental control of their accounting methods might be defeated if it was not extended to cover all of their activities. It is, accordingly, a proper exercise of the commerce power to subject to such control not only the interstate transportation operations of such carriers but their intrastate and non-transportation activities as well.⁹¹ The federal power includes that of regulating any of the activities of those engaged in interstate transportation the regulation of which is a proper means for protecting or promoting that commerce. It is not limited to regulating those of their activities that are themselves interstate commerce, or those of their instrumentalities actually employed therein.

The commerce power may be exercised to protect interstate commerce not only against the activities of those engaged therein but also of others and even of the states themselves. A statute punishing the forging of interstate bills of lading is a valid exercise of the commerce power. Such bills of lading are instrumentalities of interstate commerce, and Congress may protect that commerce from the injury to it which would result from their fraudulent issuance and use.⁹² An important application of the principle that permits Congress to protect interstate commerce even against action by the states is found in the federal regulation of intrastate railroad rates. This has been invoked primarily to protect it against certain forms of discrimination resulting from the maintenance of intrastate rates established by the states. The first case in which it was sustained involved a discrimination against interstate shippers to destinations in a state caused by the maintenance of a lower level of intrastate rates to the same destinations for intrastate

⁹⁰ SOUTHERN RY. CO. v. UNITED STATES, 222 U.S. 20, 32 S.Ct. 2, 56 L.Ed. 72, Black's Cas. Constitutional Law, 2d, 238.

⁹¹ Interstate Commerce Commis-

sion v. Goodrich Transit Co., 224 U.S. 194, 32 S.Ct. 436, 56 L.Ed. 729.

⁹² United States v. Ferger, 250 U.S. 199, 39 S.Ct. 445, 63 L.Ed. 936.

shippers that were in competition with those interstate shippers. It also involved a discrimination between shipping points located within the state and competing distributing points located in other states. It was held that the ultimate power of dealing with the problem of the interrelation of intrastate and interstate commerce lay with the federal government, that it had the power to remove any discriminations against the latter resulting from the level at which intrastate rates were maintained by the states, and that it was not limited to lowering interstate rates in removing the discrimination but might permit or order the carriers to correct it by raising intrastate rates to bring them into proper alignment with the interstate rate structure.⁹³ So paramount is this authority that state laws requiring a period to intervene between the filing of increased intrastate rates and their effective date cannot prevent the carriers from putting the increased rates into immediate effect.⁹⁴ The discriminations against interstate commerce that may be removed by a federal regulation of intrastate rates are not limited to those against persons and localities which can ordinarily be removed by raising specific intrastate rates. It includes a discrimination against interstate commerce in general which occurs when a state maintains its general intrastate rate structure at so low a level as to cast upon interstate commerce an undue burden if an adequate system of interstate transportation is to be maintained. The federal government may, therefore, regulate intrastate rates so as to compel that commerce to pay its own way and to prevent a state from thrusting the burden of its support upon interstate commerce.⁹⁵

The power of the federal government to regulate intrastate commerce is not restricted to prescribing rates therefor. It may, in order to relieve interstate commerce from undue and unjust burdens, authorize the complete abandonment by an interstate railroad of unprofitable branch lines although this necessarily involves their abandonment of intrastate services thereon. A state has no constitutional authority to compel such carrier to continue intrastate commerce on such branch lines if the federal government has authorized their abandonment in

⁹³ *Houston, E. & W. T. R. Co. v. United States*, 234 U.S. 342, 34 S.Ct. 833, 58 L.Ed. 1341. 244 U.S. 617, 37 S.Ct. 656, 61 L.Ed. 1352.

⁹⁴ *American Express Co. v. State of South Dakota ex rel. Caldwell*, 505 U.S. 563, 42 S.Ct. 232, 66 L.Ed. 385. ⁹⁵ *Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co.*, 257 U.S. 563, 42 S.Ct. 232, 66 L.Ed. 385.

carrying out its policy of providing an adequate national transportation system.⁹⁶ It has not been determined whether the federal government could validly prohibit an interstate carrier from constructing or acquiring additional facilities intended for use in intrastate commerce only, but there is no reason to doubt that its power in this matter is any less than its power to authorize the complete abandonment of existing facilities even against objections by a state. The principle underlying these decisions is that the scope of the federal commerce power includes the regulation of any intrastate transactions that have become so interwoven with interstate commerce that their regulation may be deemed necessary or proper for the effective control of interstate commerce. This principle is sufficiently broad to permit a degree of control over the local activities of carriers engaged in interstate transportation beyond that thusfar enforced.

The Promotion of an Adequate National Transportation System

The enactment of the Transportation Act of 1920 introduced many new elements into the federal control of interstate railroads. These were directed at promoting the development of a national system of transportation adequate to the country's needs. The right of Congress to exercise its commerce powers for that purpose had been recognized in the cases sustaining legislation authorizing private persons and the federal government itself to construct the instrumentalities for interstate transportation. The novelty of some of the methods provided for by the Transportation Act of 1920 to promote that purpose raised several constitutional issues that were finally settled in their favor by the Supreme Court. The most novel of these was that contained in the so-called Recapture Clause. The basic factor that induced its enactment was the practical impossibility of establishing a rate structure that would adequately sustain the operations of the railroads required to meet the country's transportation needs and that would at the same time prevent any road from earning a net income in excess of a fair return. The difficulty arose from the fact that a considerable portion of the traffic was on a competitive basis and that the rates thereon required to give one road a fair return would give a more favorably situated road more than a fair re-

⁹⁶ State of Colorado v. United States, 271 U.S. 153, 46 S.Ct. 452, 70 L.Ed. 878.

turn. The Recapture Clause provided that a part of the net earnings in excess of a specified fair return should be transferred to a reserve fund that could be used by the carriers for specified purposes only, and that the balance thereof should be placed in a revolving fund to be administered by the Interstate Commerce Commission. The purposes for which it could use that fund were not limited to promoting the interests of the carriers that had contributed to its creation but included rendering certain forms of assistance to any road, particularly the weaker roads, in order to insure the general objective of maintaining an adequate national railroad transportation system. The provision was sustained as a proper means for insuring that the railroad system as a whole should be maintained in a condition enabling all railroads to furnish the public with adequate transportation services.⁹⁷ The theory of so controlling the interrelations of the several roads engaged in interstate transportation that each and all of them might continue as efficient elements in a unified national system was also relied upon to sustain a provision of the Transportation Act of 1920 which permitted the Interstate Commerce Commission to prescribe the division of joint rates among the carriers participating in a through route, and in that connection to take into consideration the financial needs of the weaker roads.⁹⁸ The right of Congress to adapt its legislative policies in its regulation of interstate commerce to the needs of the nation as a whole justifies limiting the privilege of broadcasting to those who have been duly licensed by a federal board, and the zoning of the nation so as to preserve the radio as an effective means of public service.⁹⁹ The principle that the commerce clause confers upon Congress the power to affirmatively foster and promote the development of interstate commerce in order to advance the welfare of those immediately concerned as well as the general public thus involves the power of restricting the activities of some whenever such restrictions can be deemed necessary or proper for securing any of the purposes for the attainment of which the commerce clause may be exercised. Restrictions

⁹⁷ *Dayton-Goose Creek Ry. Co. v. United States*, 263 U.S. 456, 44 S.Ct. 169, 68 L.Ed. 388, 33 A.L.R. 472.

⁹⁸ *New England Divisions Case*, 261 U.S. 184, 43 S.Ct. 270, 67 L.Ed. 605.

⁹⁹ *United States v. American Bond & Mortgage Co.*, D.C., 31 F.2d 448, affirmed, 7 Cir., 52 F.2d 318, appeal dismissed, 282 U.S. 374, 51 S.Ct. 118, 75 L.Ed. 395.

whose primary purpose is the indirect regulation of matters that could not be directly regulated by the national government would be invalid under the doctrines of *Hammer v. Dagenhart* heretofore discussed.

Protecting Interstate Commerce Against Monopoly and Other Hindrances

The commerce clause is the basis for a vast body of federal legislation against monopolistic and unfair trade practices such as the Sherman Anti-Trust Act, 15 U.S.C.A. §§ 1-7, 15 note, the Clayton Act, 38 Stat. 730 and the Federal Trade Commission Act, 15 U.S.C.A. § 41 et seq. The purpose of the former is to prevent monopolistic agreements and practices in matters affecting interstate commerce. It lies with Congress to determine whether the policy of free competition or its opposite shall prevail in the conduct of the interstate business of the nation. It may, therefore, prohibit those engaged in interstate transportation from entering into agreements or conspiracies that directly or indirectly involve monopolistic rate fixing practises in the field of interstate transportation.¹ The great majority of the cases in which the Anti-Trust Act has been applied have involved activities or transactions that were not themselves a part of interstate commerce. The power of Congress to regulate or prohibit them thus depended on the factor that their regulation was a proper means for protecting interstate commerce from interference and obstruction resulting in whole or in part from the prohibited acts. The decisions in this field show that the power of Congress is not dependent upon the character of the acts from which the injury to interstate commerce proceeds but upon the actual or threatened injury to such commerce from those acts. It is, therefore, valid to prohibit an owner of corporate shares from voting them as part of a general plan to restrain competition in interstate rates between competing carriers.² The dissolution of a holding company organized as part of a scheme for monopolizing interstate commerce in the distribution of goods has been decreed.³ A contract between producers of a given commodity for the elimi-

¹ *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 19 S.Ct. 25, 43 L.Ed. 259. *States*, 193 U.S. 197, 24 S.Ct. 436, 48 L.Ed. 679.

² *Northern Securities Co. v. United*

Standard Oil Co. v. United States, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619, 34 L.R.A.,N.S., 834, Ann.Cas. 1912D, 734.

nation of competition between themselves in the sale of their products in the national markets may be prohibited where its necessary result would be a burden on interstate commerce.⁴ A strike of those employed in producing an article normally flowing in the channels of interstate commerce may be made illegal on the same general theory.⁵ The basis on which the other legislation referred to in this paragraph rests is the same as that which has been held an adequate support for the Sherman Anti-Trust Act.

Federal Control of Stockyards and Commodity Markets

The division of economic activities among the various sections of the country that has been facilitated by the commerce clause has created important currents of interstate commerce. There have developed in connection therewith important economic institutions that perform services of a kind without which this flow of commerce would be greatly retarded. Some of those services are an integral part of the interstate transportation itself. The receipt of livestock at stockyards at the commencement or termination of its interstate journey is an instance thereof. The power of Congress to regulate such stockyard services is clear. There are, however, many services connected with maintaining continuity in the interstate flow of goods which are not immediately a part of their transportation but which in practice affect it so directly as to bring their control within the regulatory powers of Congress. The Packers and Stockyards Act of 1921, 7 U.S.C.A. § 181 et seq., was largely concerned with regulating those who rendered services of the character last referred to. It not only prohibited packers from engaging in unfair and monopolistic practices in interstate commerce but also provided for direct federal supervision and control of the facilities and services furnished at the stockyards in handling interstate shipments and of the activities of dealers and commission men in buying and selling the livestock handled through those yards. It required the rates for the use of such facilities and for such services to be reasonable and non-discriminatory, and the same requirements were imposed with respect to all practices in connection with transactions at the

⁴ Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136.

Workers of America, 263 U.S. 295, 45 S.Ct. 551, 69 L.Ed. 963. See In re Debs, 158 U.S. 564, 15 S.Ct. 900, 39 L.Ed. 1092.

⁵ Coronado Coal Co. v. Union Mine

stockyards. The power to fix reasonable and non-discriminatory rates and practices was conferred upon the Secretary of Agriculture. This whole system of regulation was upheld against a general attack based on the theory that it was not within the federal commerce power.⁶ The stockyards were said to be great national public utilities "to promote the flow of commerce from the ranges and farms of the West to the consumers in the East," and agencies of interstate commerce for the receipt and delivery of live stock moving in interstate commerce. The business done at the stockyards between the receipt of the livestock and its later shipment therefrom was held to be either interstate commerce or so closely associated therewith as to bring it within the scope of the commerce power. The sales at the yards were deemed necessary factors for maintaining the continuing stream of commerce which it was the purpose to subject to national control by the adoption of the commerce clause. The Court refused to defeat the national purpose of protecting that current of interstate commerce from burdens resulting from practices at those points merely because some of the regulated activities might be of a non-interstate character when considered apart from the interstate movement of goods of which they were a necessary incident.

This same general approach characterized the decision of the Supreme Court in sustaining the extensive system of federal regulation of sales for future delivery on the nation's commodity exchanges which was provided for by the Grain Futures Act, 7 U.S.C.A. §§ 1-17.⁷ The practical effect of this Act was to limit such sales (with exceptions not pertinent to the main issues) to exchanges that would comply with the regulatory system provided by the Act. It was recognized that these transactions were generally not interstate commerce. The general system of regulation was, however, sustained as a proper means for protecting interstate commerce in grains from the burdens and obstructions resulting from the manipulation of the prices of futures on the grain exchanges. Even the regulation that required the authorized exchanges to adopt a rule admitting the authorized representatives of co-operative associations of grain producers to membership on the exchanges, and

⁶ *Stafford v. Wallace*, 258 U.S. 495, 42 S.Ct. 397, 66 L.Ed. 735, 23 A.L.R. 229.

Olsen, 262 U.S. 1, 43 S.Ct. 470, 67 L.Ed. 839. See, also, *Moore v. Chicago Mercantile Exchange*, 9 Cir., 90 F.2d 735.

⁷ *Board of Trade of Chicago v.*

which prohibited the adoption of a rule preventing the return of the net earnings of such representative to the membership of such associations on a patronage basis, was held to have a sufficiently close relation to interstate commerce to be within the federal commerce power. The principal importance of these two cases lies in their emphasis upon the need of adapting the construction of the commerce clause to the exigencies of modern economic growth and change, and in their clear definition of the "current of interstate commerce" concept. That concept had, however, already been developed in earlier cases.⁸ It should also be noted that a part only of the regulations sustained in these cases were upheld as dealing with transactions in the current of interstate commerce, and that the regulation of the others was sustained because they affected that current.

Federal Control of Production and Local Commercial Activities

It is apparent that these principles afford a most effective instrument for expanding federal control over the nation's economic life. There are few aspects thereof that can be said to be so completely unrelated to interstate commerce as not to affect it in any degree. It is quite probable that there are none of that character. It may even be affirmed with more than mere plausibility that this is also true of many activities lying outside the sphere of economics and business. This pervasive inter-relation of interstate and intrastate activities and transactions has been responsible for the difficult constitutional problem of preventing the commerce power from being used as the means for federal invasion of state powers. The line between the permissible and the prohibited federal regulation has been defined by the courts in the principle that the national power includes the regulation of those local matters, activities and transactions that directly affect interstate commerce, but does not include their regulation if they affect it only indirectly. This principle is unavoidably vague, and the Supreme Court has recognized that the precise line can be drawn only as individual cases arise.⁹ It has, however, been equally insistent that a line must be drawn if the constitutionally established federal system is to be maintained.¹⁰ It would be futile to attempt a logical reconciliation

⁸ See *Swift & Co. v. United States*, 196 U.S. 375, 25 S.Ct. 276, 49 L.Ed. 518.

S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, Black's Cas. Constitutional Law, 2d, 240.

⁹ *A. L. A. SCHECTER POULTRY CORP. v. UNITED STATES*, 295 U.

¹⁰ *A. L. A. SCHECTER POULTRY CORP. v. UNITED STATES*, 295 U.

of the decisions, even of those rendered within relatively short periods. The decisions rendered in passing on federal legislation enacted during the current depression have put the principle to some of its severest tests. This has been particularly true with respect to such parts thereof as undertook to regulate various phases of the production of goods, and their local processing and sale after their interstate movement has terminated. The attempt to regulate the hours and wages in the bituminous coal production industry, and to confer upon labor employed therein the right to bargain collectively with its employers, was held to be an invalid exercise of the commerce power.¹¹ The fact that the bulk of the coal mined by the industry was intended for, and in fact did move into, the channels of interstate commerce was held insufficient to establish that direct relation between labor conditions therein and interstate commerce required for the federal regulation thereof. The absence of a similar direct relation to interstate commerce made invalid a regulation of the wages and hours of employees of operators of local slaughter houses serving a wholly local retail market, as well as a regulation of their local selling practices.¹² The fact that the bulk of the poultry had been shipped into the state from outside it, and that such was the customary current of commerce and trade, did not suffice to bring the regulated phases of those local activities within the federal commerce power as directly affecting interstate commerce. The view that Congress might regulate those activities because of their relation to the price structure was forcefully rejected as leading to a complete federal control of the internal economic life of the states. The power of Congress to fix, or authorize a governmental board to fix, the prices on interstate sales has not been definitively settled. A majority of the Supreme Court held that it was unnecessary to decide this matter in the *Carter v. Carter Coal Company Case*.¹³ Four of the Justices of the Court supported the view that Congress did have that power so far as it was a question of the scope of the commerce power. Their position would undoubtedly be upheld if the issue came before the Court

S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, Black's Cas. Constitutional Law, 2d, 240.

¹¹ *Carter v. Carter Coal Co.*, 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160.

¹² A. L. A. SCHECTER POULTRY

CORP. v. UNITED STATES, 295 U. S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947, Black's Cas. Constitutional Law, 2d, 240.

¹³ 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160.

today. The importance of this power to any extensive scheme of economic planning by the federal government is patent.

There have been several important decisions since those last considered that cast some doubt upon how far the general principles on which they were based would, if now applied to their facts, result in the same judgments. This doubt is well justified so far as concerns the regulation of labor relations in businesses whose connection with interstate commerce is similar to that of the industries involved in those cases. The later decisions do not, however, warrant a conclusion that federal regulation of even labor relations would be valid for every local industry or business regardless of the immediacy of its association with the currents of interstate commerce, nor that such regulation would be upheld in the case of other phases of local industries and businesses as immediately associated with those currents of commerce as were those involved in the cases herein discussed or in the later decisions. It will also require further decisions to determine whether the area within which local industry and business may be regulated will be expanded to include those whose whole production is locally marketed if that prove necessary to protect out-of-state producers competing with them therein. An expansion of the federal area of local control on that basis would involve an approach analogous to that employed in validating federal control over intrastate rates.

Extent of Federal Control Over Labor Relations

The Congress has from time to time enacted laws intended to regulate the conditions of employment of those engaged in interstate transportation, and their relations to their employers. Its power to regulate these matters in some respects has been definitely established. It may require railroad equipment to meet specified standards of safety, and this may be required even with respect to cars while employed in purely intrastate transportation.¹⁴ It may also promote efficiency of operation by substituting for the common law rules defining the liability of an employer to his employees for injuries suffered in the course of their employment a more humane and a fairer system, as was done by the Federal Employers' Liability Act. Its abrogation of the fellow servant, assumption of risk, and con-

¹⁴ SOUTHERN RY. CO. v. UNITED STATES, 222 U.S. 20, 32 S.Ct. 2, 56 L.Ed. 72, Black's Cas. Constitutional Law, 2d, 238.

tributory negligence rules in defining the liability of railroads to their employees engaged in interstate commerce is a proper regulation thereof, since it subjects those carriers to pressure to create safe conditions of employment in aid of interstate commerce.¹⁵ The abrogation of the fellow servant rule may validly include the case in which the negligence is that of a fellow servant while engaged in intrastate commerce, since the existence of the power depends not upon the source of the injury but upon the effect of the rule upon interstate commerce.¹⁶ Contracts releasing an interstate railroad from a liability imposed by that Act may be invalidated, even though entered into before the Act was passed.¹⁷ Private contracts cannot be permitted to fetter the federal commerce power, and are deemed in law to have been made subject to being affected by subsequent valid exercises of that power. It has, however, been held that the commerce power does not authorize the extension of this type of regulation to railroad employees when not engaged in interstate commerce.¹⁸ The effect of this position has been considerably limited by liberal constructions as to when they are engaged in interstate commerce.

Hours of Labor and Wages

The hours of labor of railroad employees engaged in operating interstate trains may be regulated, even though they may be at the same time engaged in intrastate commerce also.¹⁹ The power of Congress to regulate the wages of such employees for a relatively short period as an emergency measure to prevent a threatened interruption of interstate commerce by a strike for shorter hours and higher wage rates has been sustained.²⁰ The emphasis on the emergency and temporary character of the legislation makes it somewhat difficult to determine how far the decision can be construed as countenancing such legislation un-

¹⁵ Second Employers' Liability Cases, *Mondou v. New York, N. H. & H. R. Co.*, 223 U.S. 1, 32 S.Ct. 169, 56 L.Ed. 327, 38 L.R.A.,N.S., 44.

¹⁶ Second Employers' Liability Cases, *Mondou v. New York, N. H. & H. R. Co.*, 223 U.S. 1, 32 S.Ct. 169, 56 L.Ed. 327, 38 L.R.A.,N.S., 44.

¹⁷ *Philadelphia, B. & W. R. Co. v. Schubert*, 224 U.S. 603, 32 S.Ct. 589, 56 L.Ed. 911.

¹⁸ First Employers' Liability Cases, *Howard v. Illinois Cent. R. Co.*, 207 U.S. 463, 28 S.Ct. 141, 52 L.Ed. 297.

¹⁹ *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U.S. 612, 31 S.Ct. 621, 55 L.Ed. 878.

²⁰ *Wilson v. New*, 243 U.S. 332, 37 S.Ct. 298, 61 L.Ed. 755, L.R.A.1917E, 938, Ann.Cas.1918A, 1024.

der ordinary conditions and as a permanent policy. However, the decision was rendered at a time when legislative regulation of wages as a permanent policy would undoubtedly have been held to violate the due process clause of the Fifth or Fourteenth Amendments. Whether the change in judicial views on that issue would be carried over to the issue of its validity as an exercise of the commerce power in the case of interstate railroad employees cannot be definitely determined. There is, however, a considerable probability that it would be. It is, therefore, not at all improbable that the adoption of legislative wage regulation for the employees of common carriers employed in interstate commerce would be held a valid exercise of the commerce clause and not in conflict with the due process clause of the Fifth Amendment. The validity under the commerce clause of legislation extending the policy to employees not employed in interstate commerce is more doubtful. However, the proper functioning of the vast systems devoted to conducting the nation's interstate transportation could be seriously impaired by dissatisfied labor other than that directly employed in the actual movement of interstate traffic. It would not be an illogical or unreasonable extension of the principles permitting Congress to protect interstate commerce to validate legislative wage regulation for such employees.

Compulsory Retirement Pension Systems

There has occurred within recent years a distinct movement in the direction of governmental intervention to provide for the aged and unemployed. The power of the federal government to establish vast systems of unemployment insurance and old age pensions by exercising its power to levy taxes to promote the general welfare of the United States has already been discussed. It had, however, made an earlier attempt to provide old age security for the employees of interstate railroads by establishing a compulsory retirement and pension system for all railroads engaged in interstate commerce. The Act provided for the creation of a pension fund through compulsory contributions from both employees and the railroads. It defined those who were to share in the fund, specified the conditions on which they were entitled to receive pension allowances therefrom, and determined the methods for computing the amounts to be paid. The fund was to be treated as a unit, and payments of pensions therefrom to the employees of a given railroad were not limited to amounts paid into it by them and such railroad. It was to be adminis-

tered by an agency of the federal government. The Act was held invalid as beyond the powers of Congress under the commerce clause, and as violating the due process clause of the Fifth Amendment in some of its provisions.²¹ The prevailing opinion rests its conclusion that the Act was not within the federal commerce power on the grounds that its provisions had no reasonable relation to promoting the safety, economy or efficiency of interstate transportation. It rejected the theory that it would promote these ends through improving the morale of the employees, and viewed the Act as aimed at assuring employees against old age dependency rather than at attaining objectives within the valid scope of the commerce clause. A dissenting opinion based its view that the Act was a valid exercise of the commerce power upon the theory that the system provided by the Act would in fact tend to promote an increase in the safety and efficiency of interstate railroad transportation because of its wholesome effects upon the morale of the employees. It also asserted that the fundamental consideration supporting the Act was the duty of industry to take care of its human wastage, and that federal legislation applying that principle in defining the relations between interstate carriers and their employees engaged in interstate commerce was a regulation of interstate commerce. The decision would probably be over-ruled on this point if the matter came before the Supreme Court again. There are many forms of work constituting interstate commerce other than that performed in connection with interstate transportation. It would not follow that a reversal of the Railroad Retirement Act Case would validate a compulsory retirement pension system for employees engaged in other forms of work constituting employment in interstate commerce. It should be noted that the majority and minority of the Court in the case just referred to were agreed that Congress had the power to force the retirement of superannuated employees engaged in interstate transportation; their differences related to the extent to which it could make reasonable provision for the protection of those compulsorily retired.

Federal Protection of Collective Bargaining

The power of Congress to protect interstate commerce from interruption has already been shown to justify federal regulation of the wages of the employees of railroads employed in in-

²¹ Railroad Retirement Board v. Alton R. Co., 295 U.S. 330, 55 S.Ct. 758, 79 L.Ed. 1468.

terstate transportation. It also includes that of providing for the peaceable settlement of disputes between the railroads and their employees by establishing a system of voluntary arbitration,²² and, under emergency circumstances, a system of compulsory arbitration.²³ It may shape its legislation to promote that policy by taking actual conditions into account, and devise practical remedies therefor. It may, therefore, as an appropriate means to that end, recognize the right of employees to bargain collectively, and require the railroads to recognize that right to a limited extent. It can, furthermore, so legislate as to make that right effective. It is, therefore, a proper exercise of its commerce power to provide that the representatives of the railroads and of their employees in carrying out the system of collective bargaining shall be designated by each of them without interference, influence or coercion by the other, and that the organization by the employer of a company union shall be illegal.²⁴ A requirement that collective bargaining, if invoked, shall be with the authorized representatives of the employees as determined by an election conducted by a governmental board in accordance with a method prescribed by law, is a valid exercise of the commerce power. It is also valid to require the railroad employer to make reasonable efforts to reach an agreement with the elected representatives of its employees.²⁵ It has not yet been held, however, that either the employer or employees can be compelled to reach an agreement by such a system of collective bargaining. The enforcement upon both of an award resulting from a compulsory arbitration proceedings is a somewhat different matter, and, as has already been said, has thus far been stated to be valid only in an emergency. Nor has it yet been held that it would be valid, either under the commerce or due process clauses, to prohibit an employer engaged in interstate commerce from contracting individually with his employees engaged in interstate commerce. The power of Congress as above outlined is not limited to regulating the relations of interstate railroads to such of their employees only as are actually directly engaged in interstate transportation or activities directly connected therewith.

²² *Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks*, 281 U.S. 548, 50 S.Ct. 427, 74 L.Ed. 1034.

²³ *Wilson v. New*, 243 U.S. 332, 37 S.Ct. 298, 61 L.Ed. 755, L.R.A.1917E, 938, Ann.Cas.1918A, 1024.

²⁴ *Texas & N. O. R. Co. v. Brother-*

hood of Railway & S. S. Clerks, 281 U.S. 548, 50 S.Ct. 427, 74 L.Ed. 1034.

²⁵ *Virginian Ry. Co. v. System Federation No. 40, Railway Employees Dept. of American Federation of Labor*, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789.

It may include within such regulatory system the repair shop employees of interstate railroads. Their activities have such a relation to the interstate activities of the railroad that the former may appropriately be regarded as a part of the latter. It was also stated in support of this conclusion that a strike by them would directly interfere with interstate commerce.²⁶ It would be difficult to exclude any employees of a railroad engaged in interstate commerce if the latter consideration is accorded its full implications.²⁷

The scope of federal control over labor relations is not limited to industries engaged in interstate and foreign transportation. It has recently been extended to persons engaged in manufacturing to regulate their relations to their employees engaged therein. The cases in which these extensions occurred involved the application to such industries of the provisions of the National Labor Relations Act, 29 U.S.C.A. § 151 et seq., prohibiting unfair labor practices by employers in or affecting interstate commerce, and establishing a federal board to enforce its provisions. The extent to which these recent decisions permit federal regulation of local manufacturing and other local production activities can be ascertained only by considering the general approach of the Supreme Court in those cases and the reasoning by which it justified the application of the Act to the facts of the specific cases before it. The factual pattern present in them all was the importation from other states of a considerable part of the raw materials used by the manufacturer in his production activities, the carrying on of local manufacturing processes in producing goods for both the intrastate and interstate markets, and the actual distribution of the bulk of the manufactured products to points outside of the state in which they had been manufactured. In the one case²⁸ these several activities were all carried on by a single group of affiliated corporations and thus constituted dependent parts of an integrated industrial unit. The other cases²⁹ involved no such integrated industrial units. It

²⁶ *Virginian Ry. Co. v. System Federation No. 40, Railway Employees Dept. of American Federation of Labor*, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789.

²⁷ See, also, *Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board*, 301 U.S. 142, 57 S.Ct. 648, 81 L.Ed. 965

²⁸ *NATIONAL LABOR RELATIONS BOARD v. JONES & LAUGHLIN STEEL CORP.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893, 108 A.L.R. 1352, *Black's Cas. Constitutional Law*, 2d, 247.

²⁹ *National Labor Relations Board v. Fruehauf Traller Co.*, 301 U.S. 49, 57 S.Ct. 642, 81 L.Ed. 918, 108 A.L.R.

may, therefore, be inferred that the existence of that factor is not essential to the existence of federal power of regulation. The percentages of raw materials imported from outside it into the state in which the manufacturing was carried on, and the percentages of the finished products shipped to markets outside the state of production, varied widely but were considerable in them all. It may well be inferred that the probability that federal control over production will be sustained varies directly with the amount of these percentages. These will give a fair index of the extent to which interruption of the production activities will burden interstate commerce. There is, however, no logical basis for treating that as a factor since the character of the burden as direct or indirect should not depend upon its amount. It is quite probable, however, that it will nevertheless be deemed a factor of some importance. To ignore it wholly would open a direct path to an easy expansion of federal control over local phases of the nation's industrial life beyond the point to which courts have seemed willing to permit it to go. The presence of factors, other than those hereinbefore mentioned, will undoubtedly be held sufficient to justify an extension of this form of regulation to other types of local production.

The theory on which the extension of federal control was sustained in those decisions was that the enforcement of the prohibition of unfair labor practices constituted, under the circumstances of the specific cases, a proper means for protecting the free flow of interstate commerce from an actual or threatened interruption thereof and interference therewith. It was stated to be immaterial that the application of the Act to employees engaged in production might not be sustainable on the theory that their activities themselves comprised a part of the stream or flow of interstate commerce, since the power of Congress was not limited to transactions which could be deemed an essential part thereof but included that of protecting interstate commerce against injurious action arising from sources other than transactions and activities in that interstate stream and flow. The principle that defines the character of productive activities that may be subjected to federal control also defines the character of federal regulation to which it may be subjected. It was, accordingly, held to be a proper exercise of the commerce power to enact legislation safeguarding to employees in such industries the right of self-organization and freedom in the choice of rep-

representatives for purposes of collective bargaining. These were asserted to be fundamental rights, the exercise of which Congress may protect against interference by employers. It is also an appropriate means to protect these rights by requiring the reinstatement, with pay for time lost, of employees who have been discharged for union activities. These decisions, however, go no further than to hold that employers in such industries may be compelled to deal with the freely chosen representatives of their employees if he deals with any representatives. They do not decide that he can be forced to negotiate for a collective agreement. It would seem, however, that the commerce clause would permit subjecting employers in such industries to even that form of regulation since that might well be deemed an appropriate means for protecting interstate commerce. The logical implications of these decisions would permit the commerce clause to be exercised to regulate practically any phase of labor relations in such industries since it is difficult to exclude any of them as a possible, or even probable, source of a direct burden on interstate commerce. These include wage rates and hours of labor. It is more than doubtful that *Carter v. Carter Coal Co.*³⁰ can still be deemed good law even as applied to its own special facts, and its principles and theory can clearly no longer be held to state the law as to the scope of the federal commerce power over the nation's industrial activities. Furthermore, the *Adair Case*³¹ may safely be ignored in stating the present scope of the federal commerce power. It is, however, equally certain that its extension by the recent decisions herein discussed has not subjected the whole of the nation's industrial and commercial activities to federal regulation through exercises by Congress of its commerce powers. It may also be observed that, so far as the commerce clause is concerned, the federal government would have the same power to hinder as to promote the development of unions and collective bargaining in industries of the type considered in this paragraph. The recent decisions have opened this field to federal control, but have left to Congress a wide range of discretion in determining the character of legislation appropriate for protect-

³⁰ 298 U.S. 238, 56 S.Ct. 855, 80 L. Ed. 1160.

³¹ *Adair v. United States*, 208 U. S. 161, 28 S.Ct. 277, 52 L.Ed. 436, 13 Ann.Cas. 764 (holding as not within the federal commerce power a federal statute penalizing any interstate

railroad, or any agent thereof, for discriminating against any employee of such railroad employed in interstate commerce for membership in a union. *Adair* had been indicted for discharging such employee solely because of his union membership).

ing interstate commerce by the regulation of labor relations in both interstate transportation, manufacturing, and other forms of productive activity.

FEDERAL CONTROL OVER FOREIGN COMMERCE

145. The scope of the power of Congress to regulate foreign commerce is at least as extensive as is its control over interstate commerce. It seems that its power to prohibit foreign commerce is less restricted than its power to exclude goods or persons from interstate commerce, but this may be due in part to the fact that the national government has exclusive and plenary control over the nation's international relations.

The power of Congress to regulate foreign commerce is conferred upon it by the same clause that confers upon it the power to regulate interstate commerce. It has never been claimed that its power over the former is less than its power over the latter. It may, accordingly, be asserted that the principles determining what regulations are valid exercises of the power to regulate interstate commerce would apply in determining what would be valid regulations of foreign commerce. It is, not, however, as clear that a regulation that would be invalid as applied to interstate commerce would be invalid as applied to foreign commerce. It has at times been intimated that the power to exclude articles from foreign commerce, unlike that of excluding them from interstate commerce, is unlimited.³² No case has been found holding invalid any Act of Congress excluding any article from foreign commerce.³³ This is in sharp contrast with the decisions (heretofore discussed) holding that Acts of Congress excluding certain goods from interstate commerce exceeded the

³² *Buttfield v. Stranahan*, 192 U.S. 470, 24 S.Ct. 349, 48 L.Ed. 525 (prohibiting importation of tea below a specified standard held a proper exercise of commerce power).

³³ See following cases sustaining statutes prohibiting importation of given articles into the United States: *The Abby Dodge v. U. S.*, 223 U.S. 166, 32 S.Ct. 310, 56 L.Ed. 390 (deep sea sponges taken by divers); *Weber v. Freed*, 239 U.S. 325, 36 S.Ct.

131, 60 L.Ed. 308, Ann.Cas.1916C, 317 (prize fight films). See, also, *Brolan v. United States*, 236 U.S. 216, 35 S.Ct. 285, 59 L.Ed. 544 (prohibiting transportation of opium imported in violation of statute prohibiting its importation). As to exclusion of aliens, see *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 29 S.Ct. 671, 53 L.Ed. 1013. There is no doubt that the power includes the prohibition of exports as well as those of imports.

powers conferred by the commerce clause, despite the fact that judicial statements have often described the power to regulate interstate commerce as a plenary power as much so as that of regulating foreign commerce. It has not proved to be so in actual practice. This may be due in part to the fact that the control of foreign commerce involves international relations whose control is exclusively vested in the federal government.³⁴

FEDERAL CONTROL OVER NAVIGABLE WATERS OF THE UNITED STATES

146. The commerce power of Congress includes that of controlling the navigable waters of the United States, regulating their use for the purposes of interstate and foreign commerce, and regulating the activities of those using them therefor so far as such regulation is an appropriate means for protecting or promoting the use of such waters for such forms of commerce.

The power of the national government over the navigable waters of the United States has already been incidentally referred to in discussing the power of Congress under the commerce clause to promote the development of facilities for conducting interstate and foreign commerce. This is but a part of the total federal maritime power. That includes two wholly distinct things: (1) control over interstate and foreign commerce so far as that involves (a) transportation by water on the navigable waters of the United States or the ocean, and (b) the instrumentalities engaged therein or used therefor; and (2) control over the navigable waters of the United States, irrespective of whether or not the matter controlled constitutes interstate or foreign commerce or something directly related thereto. The former of these only is based on the commerce clause, the latter having its source in that provision of Article 3, Section 2, of the Constitution which includes in federal judicial power all cases of admiralty and maritime jurisdiction. This latter will be considered when the federal judicial power is discussed.

The scope of federal maritime power dependent upon the commerce clause extends to all the navigable waters of the United States. A navigable water of the United States is one which,

³⁴ The commerce clause also confers upon Congress the power to regulate commerce with the Indian

tribes. For a discussion thereof, see *United States v. Holliday*, 3 Wall. 407, 18 L.Ed. 182.

navigable in fact, forms, either alone or in conjunction with other connecting navigable waters, an avenue of interstate or foreign commerce.³⁵ The test of navigability originally adopted was that of tidal flow,³⁶ but it is now navigability in fact.³⁷ It is immaterial that it lies wholly within the boundaries of a single state. Hence a canal, constructed by a state and lying wholly within it, connecting two navigable waters of the United States, is itself a navigable water of the United States.³⁸ Every body of water which is a part of the navigable waters of the United States is subject to federal control for purposes of regulating and improving navigation thereon, irrespective of the ownership of the beds of the stream and the extent of riparian rights in the stream as defined by state law.³⁹ This is the basis of federal control over bridges, docks and harbor lines already discussed. The courts are loathe to hold that federal constructions that purport to be for the purpose of improving navigation on such waters are not in fact such. This has in fact enabled the national government to carry out important power development projects as an incident to improving the navigable character of the navigable waters of the United States.⁴⁰ In no case has the Supreme Court invalidated such projects on the theory that the commerce power was being employed as an invalid support for projects unrelated to the objectives realizable by exercises of the commerce power. The federal control over such navigable waters also includes extensive powers of regulating vessels plying upon them,⁴¹ even those operating thereon in intrastate commerce only. Hence federal steamboat licensing and inspection acts may validly apply to the latter.⁴² The same principle vali-

³⁵ *The Daniel Ball*, 10 Wall. 557, 19 L.Ed. 999.

³⁶ *The Thomas Jefferson*, 10 Wheat. 428, 6 L.Ed. 358.

³⁷ *The Genesee Chief v. Fitzhugh*, 12 How. 443, 13 L.Ed. 1058.

³⁸ *The Robert Parsons, Perry v. Haines*, 191 U.S. 17, 24 S.Ct. 8, 48 L. Ed. 73 (Erie Canal). As to the status of a lake or river entirely within the boundaries of a single state and not connected by navigable waters with a navigable water of the United States but over which an interstate railroad ferried its cars, see *The Katie*, D.C., 40 F. 480, 7 L.R.A. 55.

³⁹ *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 33 S.Ct. 667, 57 L.Ed. 1063; *United States v. Cress*, 243 U.S. 316, 37 S.Ct. 380, 61 L.Ed. 746.

⁴⁰ See discussion of prevailing and dissenting opinions in *ASHWANDER v. TENNESSEE VALLEY AUTHORITY*, 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 688, *Black's Cas. Constitutional Law*, 2d, 261.

⁴¹ *The Daniel Ball*, 10 Wall. 557, 19 L.Ed. 999.

⁴² *United States v. Jackson*, 26 Fed.Cas. p. 559, No. 15,458.

dating their application to such vessels would justify any control over any activities on such waters as may be appropriate to protect or promote their use for purposes of interstate or foreign commerce.⁴³

CONSTITUTIONAL LIMITATIONS UPON EXERCISES OF THE COMMERCE POWER

147. The exercise of the commerce power is limited by several constitutional limitations expressly aimed at that objective, and also by every general limitation upon federal powers contained in the Constitution. The most important limitation of the latter type is the due process clause of the Fifth Amendment.

Specific Limitations

There are several specific constitutional limitations imposed on Congress' exercise of its power to regulate interstate and foreign commerce. It is prohibited from giving any preference by any regulation of commerce to the ports of one state over those of another;⁴⁴ and vessels bound to, or from, one state may not be obliged to enter, clear or pay duties in another.⁴⁵ The Eighteenth Amendment, now repealed, expressly prohibited the sale or transportation of intoxicating liquors within, their importation into, and their exportation from the United States for beverage purposes.⁴⁶ The Twenty-first Amendment, which repealed the Eighteenth, also prohibited the transportation or importation of intoxicating liquors into any state, territory or possession of the United States in violation of the laws thereof. These pro-

⁴³ That Congress had the power to authorize the United States to construct the Panama Canal, see *Wilson v. Shaw*, 204 U.S. 24, 27 S.Ct. 233, 51 L.Ed. 351.

⁴⁴ U.S.C.A.Const., Art. 1, Section 9. For cases considering this provision, see *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 How. 421, 15 L.Ed. 435, and *Alaska v. Troy*, 258 U.S. 101, 42 S.Ct. 241, 66 L.Ed. 487.

⁴⁵ U.S.C.A.Const. Art. 1, Section 9.

⁴⁶ For cases discussing the scope of Congress' power in enforcing the

Eighteenth Amendment, U.S.C.A. Const. Amend. 18, see *Ruppert Inc. v. Caffey*, 251 U.S. 264, 40 S.Ct. 141, 64 L.Ed. 260; *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 40 S.Ct. 106, 64 L.Ed. 194; *Cunard S. S. Co. v. Mellon*, 262 U.S. 100, 43 S.Ct. 504, 67 L.Ed. 894, 27 A.L.R. 1306; *Everard's Breweries v. Day*, 265 U.S. 545, 44 S.Ct. 628, 68 L.Ed. 1174; *Selzman v. United States*, 268 U.S. 466, 45 S.Ct. 574, 69 L.Ed. 1054; *Lambert v. Yellowley*, 272 U.S. 581, 47 S.Ct. 210, 71 L.Ed. 422, 49 A.L.R. 575.

visions have produced very little important judicial construction of their effect upon the federal commerce power.

Due Process Clause of Fifth Amendment

The exercise of the commerce power is subject to every general limitation upon federal legislative power found in the Constitution. The majority of them are seldom likely to be made the basis for an attack upon exercises of that power. The one that has been most frequently invoked by litigants has been the provision of the Fifth Amendment that no person shall be deprived of his life, liberty, or property without due process of law. The Supreme Court has explicitly recognized that this is a limit on Congress' exercise of its commerce power.⁴⁷ There have, however, been but few federal regulations enacted under the commerce clause that have been held invalid for conflict with its requirements. It has been often urged against the validity of legislation and orders of the Interstate Commerce Commission regulating the relations of interstate railroads with the public and with each other. An order establishing through routes and joint rates does not violate it,⁴⁸ nor does a statute imposing on the initial carrier liability for damages caused by connecting carriers where the former is entitled to recover from the carrier actually causing the damage whatever it has been compelled to pay.⁴⁹ Orders of the Interstate Commerce Commission directing interchange of traffic among carriers do not violate due process.⁵⁰ Its orders directing carriers to follow reasonable rules in the distribution of cars during periods of car shortage do not deprive owners of private cars of property without due process merely because they deprive him of a competitive advantage incident to their ownership.⁵¹ Nor does such order deny due process to a shipper because it deprives him of the advantage derivable from the location of his mines on two railroad lines.⁵²

⁴⁷ *Virginian Ry. Co. v. System Federation No. 40, Railway Employees Department of American Federation of Labor*, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789.

⁴⁸ *St. Louis Southwestern R. Co. v. United States*, 245 U.S. 136, 38 S.Ct. 49, 62 L.Ed. 199.

⁴⁹ *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U.S. 186, 31 S.

Ct. 164, 55 L.Ed. 167, 31 L.R.A., N.S., 7.

⁵⁰ *Chicago, I. & L. Ry. Co. v. United States*, 270 U.S. 287, 46 S.Ct. 226, 70 L.Ed. 590.

⁵¹ *Assigned Car Cases*, 274 U.S. 564, 47 S.Ct. 727, 71 L.Ed. 1204.

⁵² *United States v. New River Co.*, 265 U.S. 533, 44 S.Ct. 610, 68 L.Ed. 1165.

An order whose effect is to permit one carrier to use another's equipment without compensation takes the latter's property without due process and is invalid.⁵³ Congress may prohibit the issuance by railroads of free passes for use in interstate commerce, and due process is not violated by voiding even antecedent contracts for their issuance.⁵⁴ The due process clause prevents the enforcement of confiscatory rates for interstate transportation or associated services. It has also been invoked to attack federal regulation of labor regulations in or affecting interstate commerce. It was one basis for holding invalid an Act of Congress prohibiting railroads from discriminating against their employees engaged in interstate commerce because of their membership in a labor union.⁵⁵ This case has in substance been overruled by the recent decisions prohibiting railroads and other employers from engaging in unfair labor practices in or affecting interstate commerce. The restrictions on employers imposed by those prohibitions have been held not to deny them due process.⁵⁶ The most important recent decision in which the due process clause was held to invalidate legislation regulating the relations of interstate railroads and their employees is that of *Railroad Retirement Board v. Alton Railroad Co.*⁵⁷ It was the reason for holding invalid such provisions of the compulsory retirement pension system as those that required the maintenance of a single pension fund instead of separate funds for each railroad, included among the beneficiaries all who had been employed by the railroads within one year prior to the enactment of the Act regardless of the reason for their discharge, and measured the amount of the pension by unreasonable factors. The procedural limits required by due process in the administrative enforcement of legislative policies in the field of interstate commerce are no different than those prevailing in other fields.

⁵³ *Chicago, R. I. & P. R. Co. v. United States*, 284 U.S. 80, 52 S.Ct. 87, 76 L.Ed. 177.

⁵⁴ *Louisville & N. R. Co. v. Mottley*, 219 U.S. 467, 31 S.Ct. 265, 55 L.Ed. 297, 34 L.R.A.,N.S., 671.

⁵⁵ *Adair v. United States*, 208 U.S. 161, 28 S.Ct. 277, 52 L.Ed. 436, 13 Ann.Cas. 764.

⁵⁶ *NATIONAL LABOR RELA-*

TIONS BOARD v. JONES & LAUGHLIN STEEL CORP., 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893, 108 A.L.R. 1352, *Black's Cas. Constitutional Law*, 2d, 247; *Virginian Ry. Co. v. System Federation No. 40*, *Railway Employees Dept. of American Federation of Labor*, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789.

⁵⁷ 295 U.S. 330, 55 S.Ct. 758, 79 L.Ed. 1468.

The Commerce Power and Freedom of the Press

The First Amendment to the Constitution prohibits Congress from making any law abridging the freedom of the press. The protection of this provision was invoked by an agency engaged in the collection and distribution of news to newspapers published throughout the country in an attempt to invalidate an order of the National Labor Relations Board. The order required the agency to reinstate an employee who, according to the Board's findings, had been discharged because of his labor union activities. The duties of the employee had included that of rewriting news received at the office in preparing it for distribution to newspapers. It was claimed that the enforcement of the order would infringe the freedom of the press by depriving the employer of his freedom to determine what should be published by conferring upon the Board power to control that matter through its regulation of the employer's labor relations. The claim was denied by a majority of the Supreme Court since the Board's order neither prevented the employer from discharging any person for failure to edit the news without bias nor deprived the employer of complete freedom to publish the news according to his own desires.⁵⁸ A dissenting opinion found the order violative of the constitutional provision protecting the freedom of the press which was construed to include the right to exercise an uncensored judgment in the hiring and discharge of the employees through whom the publisher's policies are to be effectuated.

⁵⁸ Associated Press v. National Labor Relations Bd., 301 U.S. 103, 57 S.Ct. 650, 81 L.Ed. 953.

CHAPTER 9

THE COMMERCE CLAUSE AND STATE POWERS

- 148-150. General Considerations.
- 151-152. Contraction or Expansion of State Power Through Federal Action.
- 153-156. State Quarantine and Inspection Laws.
 - 157. State Regulation of Interstate Transportation.
 - 158. State Regulation of Export of its Natural Resources.
 - 159. State Regulation of Interstate Commercial Intercourse.
 - 160. Actions in State Courts as Burdens upon Interstate Commerce.
 - 161. State Regulation of Foreign Corporations.
 - 162. Discriminatory State Regulation.
 - 163. The Twenty-first Amendment.
 - 164. The "Original Package" Doctrine and State Taxation.
 - 165. Taxation of Goods or Persons Moving in Interstate Commerce.
- 166-167. Taxation of Property Used in Interstate Commerce.
- 168-169. Taxation of Gross Receipts and Net Income.
- 170-171. License and Franchise Taxes.
- 172-174. Discriminatory Taxes and Charges.
- 175-176. Imposts and Tonnage Duties.

GENERAL CONSIDERATIONS

- 148. The powers of a state are limited not only by valid exercises by Congress of its power to regulate interstate and foreign commerce but also by the commerce clause itself. The latter, however, has not deprived a state of all power to enact local laws that regulate or affect such commerce.
- 149. A state may, in the absence of conflicting federal regulation, regulate those local phases of interstate commerce that permit of local diversity of regulation, but not those phases thereof which require uniformity of regulation throughout the nation.
- 150. The commerce clause prevents a state from regulating even its local internal affairs if their regulation by it imposes a direct burden upon interstate commerce, but it does not of its own force prevent a state from regulating either its internal affairs or even interstate commerce if its regulation thereof affects such commerce only indirectly.

The social and economic life and organization of the nation have increasingly transcended state lines. It has already been

shown how the close integration of local and interstate activities has affected judicial construction of the federal commerce power. It is also impossible to ignore this factor in considering how far the power of the states to deal with those activities has been affected by the commerce clause. It has never been denied that a valid exercise by Congress of its commerce power would render inoperative any state regulation in conflict therewith, whether its subject-matter were a transaction in interstate commerce or one so closely connected therewith as to bring it within the legitimate ambit of federal control. The problem has been to define how far the states are prevented from regulating any matters, including transactions of the foregoing character, in the absence of a valid exercise of its commerce power by Congress. The possible matters with respect to which this issue might arise are (1) activities and transactions that are in themselves interstate commerce and thus regulable by Congress, (2) those that are not in themselves interstate commerce but are so closely connected therewith as to be regulable to some extent by Congress, and (3) those local matters that come within neither of the foregoing classes and which can be directly regulated by Congress (so far as it has any power to legislate with respect thereto) (a) mainly by giving legislative expression to a limitation on the states' power to regulate them which would exist by virtue of the commerce clause even apart from such Congressional legislation and, (b) perhaps, by freeing the states from such restriction. The precise meaning of this classification can be clarified by examples. The interstate transportation of goods or persons is an example of the first class; the activities of commission men and dealers at stockyards under the circumstances present in *Stafford v. Wallace*¹ may be taken as an example of the second class. Congress has the power affirmatively to regulate in both these cases. It is more difficult to give an example of the third class since their number is probably relatively limited. The determination of the jurisdiction of its courts by a state may be taken as an example. The courts of a state can derive their jurisdiction only from the state's own laws. The laws of a state conferring it are, however, subject to the limitations of the federal Constitution as are its laws dealing with any other matter. The commerce clause imposes such a limitation.² The Congress

¹ 258 U.S. 495, 42 S.Ct. 397, 66 L. Ed. 735, 23 A.L.R. 229.

² *Davis v. Farmers' Co-op. Equity Co.*, 262 U.S. 312, 43 S.Ct. 556, 67 L.Ed. 996.

could undoubtedly prohibit state courts from exercising a jurisdiction whose exercise would conflict with the commerce clause although its action would be quite superfluous. It could not affirmatively regulate their jurisdiction as it could other local matters such as the rates for intrastate transportation.³ It might, perhaps, relieve their jurisdiction of a limit that the courts might derive from the commerce clause in the same manner as it has been permitted to relieve the exercise of a state's police power from the restrictions resulting from the "original package" doctrine.⁴ The problems of how far the commerce clause itself limits a state can be conveniently classified in the foregoing manner.

The Nature of the Commerce Power

The limits imposed upon a state by the commerce clause are limits upon its power to regulate matters of the kind referred to in the preceding paragraph. The issue is always that of the validity of a particular regulation, or plan of regulation, thereof. The courts have developed several tests for determining this issue. The nature of the commerce power has been used as the premise for deducing one series of tests for defining how far a state may provide a rule governing interstate commerce in the absence of federal regulation thereof. The problem of the nature of the commerce power arose early in the nation's history. The view that the power was exclusive was favored, although not dogmatically asserted, by Mr. Chief Justice Marshall in his opinion in *Gibbons v. Ogden*.⁵ The view that it was exclusive only as to those subjects of the power requiring a uniform system of regulation, but concurrent with the states as to those permitting local diversity of treatment, was definitely formulated by Mr. Chief Justice Taney in his opinion in *Cooley v. Board of Wardens of Port of Philadelphia* use of *Society for Relief of D. P.*⁶ The mere grant to Congress of the power to regulate interstate commerce was held to prohibit the states from legislating to provide a rule to govern those subjects of the commerce power requiring a uniform national rule, but not to provide a rule to govern those subjects permitting local diversity of treatment. The states in enacting legislation of

³ See *Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co.*, 257 U.S. 563, 42 S.Ct. 232, 66 L.Ed. 371, 22 A.L.R. 1086.

⁴ See *In re Rahrer*, 140 U.S. 545, 11 S.Ct. 865, 35 L.Ed. 572.

⁵ 9 Wheat. 1, 6 L.Ed. 23.

⁶ 12 How. 299, 13 L.Ed. 996.

the latter type were deemed to be exercising a power to regulate interstate commerce retained by them despite the grant to Congress of the power to regulate that commerce. The tests were adopted in a case sustaining the enforcement of state pilotage rules against vessels while operating in interstate and foreign commerce. The later cases in which they have been employed have generally involved state regulation of transactions in interstate commerce. They have been used in sustaining a limited local regulation of interstate ferriage rates,⁷ and state control of rates charged local consumers of natural gas delivered to them directly from points without the state.⁸ The sale and delivery of gas and electrical current by producers in one state to distributing companies in another were held to constitute an essentially national aspect of interstate commerce and not one local to the state of either origin or delivery. The commerce clause itself was, accordingly, held to prohibit both those states from regulating the prices thereof.⁹ The tests first definitely formulated in *Cooley v. Board of Wardens of Port of Philadelphia* use of *Society for Relief of D. P.* were used in these later decisions even though the Court treated the state regulations involved therein as exercises of the police power of the states and not as exercises of a reserved power to regulate interstate commerce. Their judicial use in passing on the validity of state legislation prescribing rules to govern interstate commerce is thus independent of whether such legislation is deemed to be an exercise of a reserved power to regulate interstate commerce or of some other power reserved to the states. This result is in accord with sound constitutional theory. The commerce clause limits the states in exercising every governmental power which they possess. It would, therefore, limit any power to regulate interstate commerce reserved to them by the Constitution. It would, accordingly, be impossible to deduce all of the limits imposed upon the states by the commerce clause from the exclusive or concurrent nature of the commerce power. That method could be employed to determine the ex-

⁷ *Port Richmond & Bergen Point Ferry Co. v. Board of Chosen Freeholders of Hudson County*, 234 U.S. 317, 34 S.Ct. 821, 58 L.Ed. 1330.

⁸ *Pennsylvania Gas Co. v. Public Service Commission*, Second Dist. of State of New York, 252 U.S. 23, 40 S.Ct. 279, 64 L.Ed. 434.

⁹ *State of Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U.S. 298, 44 S.Ct. 544, 68 L.Ed. 1027; *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.*, 273 U.S. 83, 47 S.Ct. 294, 71 L.Ed. 549.

tent of the commerce power reserved to the states, but scarcely to define how far a state might exercise its other powers without violating the commerce clause. The ultimate basis for invalidating state legislation for violation of that clause is that such legislation unduly hampers the freedom of interstate commerce. The existence of that prohibited result does not depend upon whether such legislation is an exercise of a reserved power to regulate interstate commerce or of the state's police power. It depends rather upon the subject-matter and the character of the legislation. The tests of the validity of state action that have been considered in this paragraph constitute a recognition of the relevance of the former of these two factors in determining whether a given state regulation unconstitutionally burdens interstate commerce. They were framed with particular reference to state regulations of activities and transactions that are themselves a part of interstate commerce, and their use has in fact been practically confined to cases involving that type of legislation. Their use even in this field has been of limited value because of the absence of any general test for distinguishing between those subjects of the commerce power or phases of interstate commerce requiring uniform national regulation and those permitting local diversity of treatment. They are also not properly adapted for testing the validity of state action regulating local matters that are not themselves interstate commerce, and have received but slight recognition in that field.

The Commerce Power and Local Interests of the States

The principles derived from *Cooley v. Board of Wardens of Port of Philadelphia* use of *Society for Relief of D. P.* do not furnish an adequate approach to the problem of defining the limits imposed upon the states by the commerce clause. A more generalized technique is required, and has in fact been developed. The primary purposes of the commerce clause were to promote and protect interstate commerce and trade by preventing the states from interfering with their freedom through discriminatory or other burdensome exercises of the states' reserved powers. The power to regulate interstate commerce was conferred upon Congress in part at least to secure those objectives. The conduct of such commerce invariably involves activities and transactions occurring within the states, whose interests will generally be affected in some measure thereby. There is no method by which the states can compel Congress to regulate interstate commerce and trade so as to protect even

their legitimate local interests and policies from injuries caused, in whole or in part, by the conduct of interstate commerce and trade within them. A construction of the commerce clause depriving the states of all power to regulate such commerce and trade would frequently involve the sacrifice of a local interest that reasonable men generally would consider of greater importance than the right to conduct such commerce and trade with complete immunity from even reasonable state regulation thereof. It would, for example, be unreasonable to hold that freedom of interstate commerce ought to be maintained even at the cost of requiring a state, in which cattle raising was an important industry, to admit cattle suffering from a contagious disease. The commerce clause has received no such extreme construction. It confers upon interstate commerce, and thus upon the transactions and activities constituting interstate commerce and trade, immunity from such state regulation only as is deemed in law directly to burden it or them. The Congress may displace any state regulation not directly burdening interstate commerce if it deems the national interest to require it, since its power is paramount to that of the states.¹⁰

The integration of a state's social and economic life that makes it impossible to prevent the conduct of interstate commerce within it from affecting to some extent its local affairs and interests also involves the important consequence that a state's regulation of the latter affects the former to some degree. It has been shown in Chapter 8 that Congress may protect interstate commerce against injury proceeding from a state's regulation of matters that are not themselves a part of interstate commerce. Congressional action is not, however, the sole protection against such state action. The commerce clause itself imposes some limits on a state's power to regulate even the most distinctively local matters. A regulation thereof is invalid insofar as its enforcement would impose a direct burden upon interstate commerce.¹¹

The mere grant to Congress of the power to regulate interstate commerce thus operates to curtail to some extent the

¹⁰ *Pennsylvania Gas Co. v. Public Service Commission*, Second Dist. of State of New York, 252 U.S. 23, 40 S.Ct. 279, 64 L.Ed. 434; *South Carolina State Highway Dep't v. Barn-*

well Bros., Inc., 303 U.S. 177, 58 S.Ct. 510, 82 L.Ed. 734.

¹¹ *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.*, 273 U.S. 83, 47 S.Ct. 294, 71 L.Ed. 549.

power of a state to regulate what would generally be considered its purely local matters, but does not operate to completely deprive it of power to regulate even interstate commerce itself. The test of the validity under the commerce clause of state regulations, whatever their subject-matter, is their effect upon interstate commerce. They are invalid if they impose a direct burden upon it, but valid if their effect upon it is merely indirect. There is no exact principle for determining whether the effects of a particular regulation upon interstate commerce belong in the one or the other of these classes. A decision thereon is rather the result of the exercise of judgment guided, but not completely determined, by certain tests that have been formulated from time to time by the courts. A regulation that discriminates against interstate commerce, or the aim or necessary result of which is to gain a local benefit at its expense, is almost invariably held invalid as directly burdening it.¹² The fact that its subject-matter is one not requiring uniformity of national regulation is frequently relied upon to sustain it, while the fact that its subject-matter is one requiring such uniformity is often invoked to invalidate a regulation.¹³ The actual extent of the burden is an important factor in determining whether it is direct or merely incidental. Thus a state law requiring trains, including inter-state trains, to slow down at crossings has been sustained where its effect upon the operation of interstate trains was relatively slight,¹⁴ but invalid as imposing a direct burden upon interstate commerce where the effect of its enforcement would have been to double the running time of an interstate train and where none of the crossings were particularly dangerous.¹⁵ The extent of the burden is not, however, decisive. Reasonable state quarantine laws are valid although they practically stop interstate commerce in the quarantined articles.¹⁶ The basis for their validity is not that they impose but a slight

¹² See statement of Mr. Justice Stone in *South Carolina State Highway Dep't v. Barnwell Bros., Inc.*, 303 U.S. 177, 58 S.Ct. 510, 82 L.Ed. 734.

¹³ *Pennsylvania Gas Co. v. Public Service Commission*, Second Dist. of State of New York, 252 U.S. 23, 40 S.Ct. 279, 64 L.Ed. 434; *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.*, 273 U.S. 83, 47 S.Ct. 294, 71 L.Ed. 549.

¹⁴ *Southern Ry. Co. v. King*, 217 U.S. 524, 30 S.Ct. 594, 54 L.Ed. 868.

¹⁵ *Seaboard Air Line R. Co. v. Blackwell*, 244 U.S. 310, 37 S.Ct. 640, 61 L.Ed. 1160, L.R.A.1917F, 1184.

¹⁶ *SMITH v. ST. LOUIS & S. W. R. CO.*, 181 U.S. 248, 21 S.Ct. 603, 45 L.Ed. 847, *Black's Cas. Constitutional Law*, 2d, 267.

and factually indirect burden upon interstate commerce, but rather that its imposition is justified as a reasonable means for protecting an interest of the state that is more important than the national interest in freedom of interstate trade in the quarantined articles. It is this that prevents the burden from being deemed in law a direct burden upon interstate commerce within the meaning of the principle defining the limits imposed upon a state's powers by the commerce clause. A burden that is in fact rather slight may nevertheless constitute a direct burden within that principle because the purpose for imposing it does not justify a regulation that in fact interferes with interstate commerce.¹⁷ The Constitution does permit a limited sacrifice of the national interest in freedom of interstate trade and commerce for the reasonable protection of at least some state interests and policies. The tests that courts use in determining whether a state has transgressed the limits within which the commerce clause gives it freedom to protect itself, even at the expense of interstate commerce, guide them in reaching a decision on that issue. Their ultimate choice between the national and the local interests implicit in every decision on such issues depends in part upon factors that are not, and cannot be, precisely indicated by the concepts of "direct burden" and "indirect effect" employed in the statement and solution of problems of this character. The decisions in which those concepts have been applied are the principal source of the limited precision that can be given them.

CONTRACTION OR EXPANSION OF STATE POWER THROUGH FEDERAL ACTION

151. An exercise by Congress of its commerce power by which it regulates a matter that a state might regulate in the absence of federal legislation reduces to that extent the area of legitimate state regulation of, or affecting, interstate commerce. It prevents the enforcement of any state regulation that conflicts with its provisions or that interferes with the realization of its objectives.
152. Congress has a limited power to permit a state to enforce its regulations which, but for such assent, would be held invalid for conflict with the commerce clause. The precise limits of its power in this respect have not yet been determined.

¹⁷ REAL SILK HOSIERY MILLS, 45 S.Ct. 525, 69 L.Ed. 982, Black's INC. v. PORTLAND, 268 U.S. 325, Cas. Constitutional Law, 2d, 284.

Conflicting Federal and State Regulations

The principles thus far discussed define the limits within which the commerce clause permits the states to act in the absence of conflicting federal legislation. The area within which they are free to act thereunder may be reduced at any time by valid federal legislation, whether or not enacted under the commerce power. There is no affirmative duty upon Congress to enact any legislation of that character, and it is the sole judge as to how far the national interest requires it to exercise its powers in such manner as involves limiting state control over interstate commerce and related activities.¹⁸ The principal problem is to determine how far a particular federal regulation supersedes state legislation. It does so whenever there is a direct and positive conflict between the two. This would exist if conflicting regulations applied to precisely the same subject. Thus state laws governing the duty of a railroad carrier to furnish cars for interstate shipments are superseded by federal legislation regulating that subject.¹⁹ A state law is unenforceable which penalizes a railroad for refusal to accept freight for interstate shipment where to accept it would involve a violation of the Interstate Commerce Act, 49 U.S.C.A. § 1 et seq.²⁰ A direct and positive conflict might also exist even though the state and federal regulation did not cover the same subject if the necessary effect of the enforcement of the former would interfere with the successful application of the latter. Thus the enforcement of a state rule governing a railroad's duty to furnish cars for intrastate shipments might result in its inability to comply with a federal rule concerning the furnishing of cars for interstate traffic. The factor that causes the state law to be superseded in such cases is that it interferes with the effective accomplishment of the purposes for which the federal regulation was enacted. The state regulation is enforceable if its enforcement will not interfere with their realization.²¹ There is no general rule for determining whether or not its enforcement is compatible with the realization of the national policy expressed in the federal statute. It is

¹⁸ *Kelly v. Washington*, 302 U.S. 1, 58 S.Ct. 87, 82 L.Ed. 3.

¹⁹ *Chicago, R. I. & P. R. Co. v. Hardwick Farmers' Elevator Co.*, 226 U.S. 426, 33 S.Ct. 174, 57 L.Ed. 284, 46 L.R.A.,N.S., 203.

²⁰ *Southern Ry. Co. v. Reid*, 222 U.S. 424, 32 S.Ct. 140, 56 L.Ed. 257.

²¹ *Savage v. Jones*, 225 U.S. 501, 32 S.Ct. 715, 56 L.Ed. 1182; *Illinois Cent. R. Co. v. Fuentes*, 236 U.S. 157, 35 S.Ct. 275, 59 L.Ed. 517; *Erie R. R. Co. v. People of State of New York*, 233 U.S. 671, 34 S.Ct. 756, 58 L.Ed. 1149, 52 L.R.A.,N.S., 266, Ann.Cas. 1915D, 138.

a question of fact in each case. The issue is one that arises most frequently where the state and federal regulations govern activities or transactions that are themselves interstate commerce. It may, however, arise where the subject of the regulation of one or both governments is an activity or transaction that is not in itself interstate commerce. The principles already stated are equally applicable to such cases. If the federal regulation of such matters is a valid exercise of its commerce or other powers, it prevails over any state regulation thereof so far as there is a conflict between them. There is no indication that the courts determine whether such conflict exists by any other principles than those employed where both governments have assumed to regulate transactions in interstate commerce. There is no valid reason why they should employ other principles.²²

Power of Congress to Expand Scope of State Regulation

The limits which the commerce clause itself imposes upon a state are matters for judicial determination as are all other constitutional questions. Congress has, however, a limited power to permit the enforcement of state regulations affecting interstate commerce the enforcement of which would be invalid but for such permission. This power has been exercised to prevent the commerce clause from being availed of to interfere with or defeat a state's enforcement of certain of its local policies. It was first used to protect states that had enacted laws prohibiting the local manufacture and sale of intoxicating liquors against having their policy rendered ineffective by importations of such liquors from other states. The Supreme Court had construed the commerce clause as prohibiting a state from preventing the importer from making a sale of the imported liquors in their original package.²³ This led to federal legislation permitting the state law prohibiting local sales to apply to such sales. This was sustained as a valid exercise of the commerce power.²⁴ It did not, however, prevent interstate shipments of liquors that were delivered directly to consignees who had ordered them.²⁵ This was remedied by subsequent federal legislation prohibiting the inter-

²² See for a thorough discussion of these questions, *Kelly v. Washington*, 302 U.S. 1, 58 S.Ct. 87, 82 L.Ed. 3.

²³ *Leisy v. Hardin*, 135 U.S. 100, 10 S.Ct. 681, 34 L.Ed. 128.

²⁴ *In re Rahrer*, 140 U.S. 545, 11 S.Ct. 865, 35 L.Ed. 572.

²⁵ *Rhodes v. State of Iowa*, 170 U.S. 412, 18 S.Ct. 664, 42 L.Ed. 1088; *American Express Co. v. State of Iowa*, 196 U.S. 133, 25 S.Ct. 182, 49 L.Ed. 417.

state transportation of intoxicants into a state if intended to be there received, possessed, sold or used in violation of its laws. It has been stated that the purpose of this enactment was "to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught."²⁶ This statute was also held a valid exercise of the commerce power.²⁷ The effect of this decision was to validate the state prohibition law as applied to interstate shipments of liquor into it. The result of the decisions sustaining the two federal enactments herein discussed was to give a state's regulations a scope previously denied them on the basis of the commerce clause. Congressional legislation along the same lines, enacted to assist the states in enforcing their local policies against the use and sale of prison-made goods within them, has recently been held a valid exercise of the commerce power.²⁸

These decisions are the logical developments of a theory long ago formulated in *Leisy v. Hardin*.²⁹ There is dictum in the opinion in that case that the commerce power is exclusive so far as interstate commerce requires a uniform system of national regulation, and that, therefore, the states cannot regulate that commerce within that field "without the assent of Congress." The implication is clear that they may do so with such assent and within the limits thereof. The principal problem raised by these decisions is whether this power of Congress to give its assent is subject to any limits based on the commerce clause itself. They show that such assent may be validly given to permit a state to regulate not only transactions which are not in themselves interstate commerce, but also those that are a fundamental part thereof. The federal legislation giving this assent must be a valid regulation of interstate commerce.³⁰ It clearly could not

²⁶ *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U.S. 311, 37 S.Ct. 180, 61 L.Ed. 326, L.R.A.1917B, 1218, Ann.Cas.1917B, 845.

²⁷ *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U.S. 311, 37 S.Ct. 180, 61 L.Ed. 326, L.R.A.1917B, 1218, Ann.Cas.1917B, 845.

²⁸ *WHITFIELD v. STATE OF OHIO*, 297 U.S. 431, 56 S.Ct. 532, 80 L.Ed. 778, Black's Cas. Constitution-

al Law, 2d, 293; *KENTUCKY WHIP & COLLAR CO. v. ILLINOIS CENT. R. CO.*, 299 U.S. 334, 57 S.Ct. 277, 81 L.Ed. 270, Black's Cas. Constitutional Law, 2d, 230.

²⁹ 135 U.S. 100, 10 S.Ct. 681, 34 L. Ed. 128.

³⁰ This statement assumes that the exercise by Congress of its other powers could not relieve the states of a limit imposed on their powers

be exercised so as to permit a state to do anything which it was expressly prohibited from doing by any provision of the Constitution, and as clearly may be exercised to permit it to do that which the Constitution expressly permits it to do with the consent of Congress, such as laying a duty of tonnage.³¹ The principal matter discussed by the Court in the first case involving this problem was the existence of the power of Congress to give its assent at all rather than the limits thereon.³² An important basis for sustaining the Webb-Kenyon Act, 27 U.S.C.A. § 122, was that its prohibitions were limited to an article of commerce whose movement in interstate commerce Congress might have completely prohibited.³³ The Court had to meet a contention that to construe the commerce power so as to permit state prohibitory laws to be made operative as to intoxicants by Congressional action would furnish a basis for subjecting interstate commerce in all articles to state control. Its answer was that "the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest, and affords no grounds for any fear that such power may be constitutionally extended to things which it may not, consistently with the guaranties of the Constitution, embrace." The limit on the power is made to depend upon the power of Congress to prohibit interstate commerce, at least in those cases in which the enforcement of the state legislation will operate to restrict the interstate flow of goods. The principles governing the power of Congress to enact legislation prohibiting interstate transportation have recently been modified to expand its scope. It may enact such prohibition with respect to articles that are in themselves useful and harmless as well as with respect to those that are harmful. Congress may shape its policy in the light of the fact that freedom of interstate commerce would aid in the frustration of valid state laws enacted under the states' police power, and may, therefore, restrict or prohibit the interstate transportation of articles the traffic in which a state has validly prohibited in its internal commerce. It has been stated that the "pertinent point is that where

by the commerce clause. This assumption is probably well founded, but no case has been found even discussing it.

³¹ See U.S.C.A.Const., Art. 1, Section 10. See also discussion in *In re Rahrer*, 140 U.S. 545, 11 S.Ct. 865, 35 L.Ed. 572.

³² *In re Rahrer*, 140 U.S. 545, 11 S.Ct. 865, 35 L.Ed. 572.

³³ *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U.S. 311, 37 S.Ct. 180, 61 L.Ed. 326, L.R.A.1917B, 1218, Ann.Cas.1917B, 845.

the subject of commerce is one as to which the power of the state may constitutionally be exerted by restriction or prohibition in order to prevent harmful consequences, the Congress may, if it sees fit, put forth its power to regulate interstate commerce so as to prevent that commerce from being used to impede the carrying out of the state policy."³⁴ The test implicit in this statement is that the federal power may be exerted in aid of a state policy of restricting or prohibiting local commerce if said policy is itself valid under the federal Constitution. The principal provisions of that Constitution limiting a state in that matter are those of the Fourteenth Amendment, but the commerce clause itself is also such. The inclusion of the latter in testing the validity of state action for purposes of determining how far Congress may exercise its commerce power to aid the state in making its local policy effective despite the restraints of the commerce clause involves a circuitry of reasoning that reduces the usefulness of the test. This can be avoided by excluding the commerce clause as a factor in testing the constitutionality of the basic state policy. In any case, however, the Fourteenth Amendment would become an important factor in defining the scope of the federal commerce power. The full implications of the new test have not yet been developed. It is quite probable, however, that there will ultimately emerge some more precise basis for distinguishing between those state policies that Congress can, and those that it cannot, thus aid. It is also probable that the interest of freedom of interstate commerce will be recognized as a factor in determining what state policies are sufficiently important to warrant Congressional restriction of the freedom of that commerce in the interest of protecting the local policies of a state. Despite judicial recognition that the power of Congress to restrict or prohibit interstate commerce is very extensive, it has never yet been decided to be without limits implicit in the commerce clause itself. The present trend, however, justifies the view that Congress will be held to have exceeded those limits in extreme cases only. Its power to aid the states in their enforcement of a local policy is very broad.

The cases sustaining the power of Congress to assent to the enforcement of state legislation that would have been unenforceable but for such assent have all involved exercises of their police

³⁴ KENTUCKY WHIP & COLLAR CO. v. ILLINOIS CENT. R. CO., 299 U.S. 334, 57 S.Ct. 277, 81 L.Ed. 270. Black's Cas. Constitutional Law, 2d, 230.

power by the states.³⁵ It remains an unsettled issue whether it can relieve the states of limitations on their taxing powers that have been judicially developed from the commerce clause. This matter will assume increasing importance as state sales taxes increase in number, scope and amount. The reasoning of the decisions already discussed throws practically no light upon this issue. This is not necessarily conclusive. However, the Supreme Court has held numerous state taxes invalid as imposing a direct burden on interstate commerce without having ever intimated that the states' lack of power could be cured by Congressional assent to the imposition of such taxes. This is in sharp contrast with its pronouncements on the power of the states to burden interstate commerce by exercises of the police power of the states. The Court has, however, frequently treated taxation as a form of regulation even in cases in which the levy was for revenue purposes only. It would be pure speculation to discuss how far the Court will treat it as such for the purposes of enabling Congress to relieve states from some of the obstacles to the enactment and enforcement of tax policies that are clearly valid under the federal Constitution except as to interstate transactions.

STATE QUARANTINE AND INSPECTION LAWS

153. A state may by reasonable quarantine regulations prevent the introduction into it from other states or foreign countries of goods and persons, or the transportation thereof through it, so far as reasonably necessary for the protection of its general morals, health, safety or welfare. A quarantine that is too broad in its provisions is invalid as imposing a direct burden upon interstate or foreign commerce, as the case may be.
154. It may also subject such goods or persons to such reasonable inspection as may be necessary to protect those interests, and in that connection require the payment of reasonable inspection fees, but excessive inspection fees are, so far as interstate commerce is involved, invalid as direct taxes thereon.

³⁵ In the following cases the state fees, the payment of which was held permitted by the Wilson Act, were held to have been exercises of the states' police power: *Pabst Brewing*

Co. v. Crenshaw, 198 U.S. 17, 25 S. Ct. 552, 49 L.Ed. 925; *Phillips v. City of Mobile*, 208 U.S. 472, 28 S. Ct. 370, 52 L.Ed. 578.

155. Section 10 of Article 1 of the Constitution permits a state to impose an inspection fee upon imports and exports without the consent of Congress, but the amount thereof is subject to the control of, and revision by, Congress.
156. State quarantine or inspection laws that discriminate against interstate or foreign commerce are invalid for conflict with the commerce clause.

The preceding discussion has shown that the commerce clause itself places important restrictions upon a state in exercising its police power. The general principle is that a state police regulation imposing a direct burden upon interstate commerce is invalid regardless of its subject-matter. The scope of this principle cannot be defined by any merely deductive process of reasoning, but only by a consideration of the specific and concrete applications that it has judicially received. Some of the more important of these will be considered in the discussion that follows.

State Quarantine Laws

A state may protect certain of its interests even though this imposes upon interstate commerce so serious a burden as its complete prohibition. The commerce clause has not rendered the state impotent to protect its residents and their property against at least certain forms of injury and damage from the introduction into it of goods or persons from other states, or the transportation through it of such goods or persons. This principle has been frequently invoked to sustain state quarantine laws. These have usually prohibited the introduction into the state of a given article of commerce coming from another state. Its transportation through the state has sometimes been forbidden, and in the case of some of the laws has been subjected to such risks as to amount to a practical prohibition of such transportation. Most of them have imposed upon the carrier civil liability for damages caused by violating their provisions, and created presumptions to facilitate proof of the carrier's liability. The principal avowed aim of such statutes has been to protect the health of the state's residents against contagious diseases, to prevent the infection of its live stock by exposure to diseased stock, or to prevent the introduction and spread of contagious plant diseases. A state may protect any or all of these interests by quarantine legislation containing any or all of the provisions referred to above.³⁶ It is essential to the validity of such legislation that

³⁶ SMITH v. ST. LOUIS & S. W. 45 L.Ed. 847, Black's Cas. Constitutional Law, 2d, 267; Missouri, K. & R. CO., 181 U.S. 248, 21 S.Ct. 603,

one or more of such interests be threatened with injury by the introduction of the quarantined article into, or its transportation through, the state, and that its prohibitions and exclusions do not exceed those reasonably necessary to protect those interests. A quarantine may be directed not only against what is diseased but also against what has been exposed to contagious diseases.³⁷ One that is so broad as to exclude articles that a state has no lawful authority to exclude is invalid under the commerce clause. A statute quarantining against cattle coming from another state during a continuous period of eight months has been held invalid for that reason since it excluded sound as well as diseased cattle.³⁸ A state may also impose quarantines against persons, and "exclude from its limits convicts, paupers, idiots, and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases."³⁹ The limits on its power to exclude persons are the same as those applicable to its exclusion of articles of commerce.⁴⁰

This power of exclusion is one that lends itself to serious abuses, particularly since courts are hesitant to overthrow the legislative judgment as to the existence of the conditions that justify a quarantine of the scope which a state may be seeking to enforce. The fact that such legislation is at times held invalid for conflict with the commerce clause shows, however, that there is a limit to judicial toleration of the legislative subterfuges sometimes relied upon to protect local interests against the competition of interstate trade. The theory on which state quarantines are sustained is not that they do not directly regulate and burden interstate commerce but that the burden is one that interstate commerce may reasonably be made to bear in order to protect vitally important state interests. A state's power to quarantine against foreign commerce is no less than in the case of interstate commerce.⁴¹ State quarantine laws are operative only so long as

T. R. Co. v. Haber, 169 U.S. 613, 18 S.Ct. 488, 42 L.Ed. 878. Quarantine laws may also be enforced by penal sanctions; Asbell v. State of Kansas, 209 U.S. 251, 28 S.Ct. 485, 52 L.Ed. 778, 14 Ann.Cas. 1101.

³⁷ SMITH v. ST. LOUIS & S. W. R. CO., 181 U.S. 248, 21 S.Ct. 603, 45 L.Ed. 847, Black's Cas. Constitutional Law, 2d, 267.

³⁸ Hannibal & St. J. Railroad Co. v. Husen, 95 U.S. 465, 24 L.Ed. 527.

³⁹ Quoted from Hannibal & St. J. Railroad Co. v. Husen, 95 U.S. 465, 24 L.Ed. 527.

⁴⁰ Chy Lung v. Freeman, 92 U.S. 275, 23 L.Ed. 550.

⁴¹ Morgan's L. & T. R. & S. S. Co. v. Louisiana Board of Health, 118 U.S. 455, 6 S.Ct. 1114, 30 L.Ed. 237.

Congress permits them to be so. Federal quarantine regulations supersede them so far as they conflict with the provisions of the former or with the Congressional policy evidenced thereby.⁴²

State Inspection Laws

State inspection laws involve a milder form of police regulation than do quarantine laws. Their usual purpose is to determine the weight, condition, quantity and quality of articles that are to be sold or used within or beyond a state's borders in order to determine their fitness therefor. The Constitution impliedly recognizes the right of a state to subject both imports and exports to inspection.⁴³ There is no such recognition of its right to inspect articles introduced into it from another state or shipped from it into the latter. It has, however, been frequently decided that the commerce clause is not violated by the mere enactment and enforcement of state inspection laws applicable to interstate commerce.⁴⁴ Inspection laws assume a variety of forms. Inspection is in some instances made a condition precedent to the right to introduce an article into a state as an alternative to a more rigid quarantine provision. This is valid so far as its purpose and effect are limited to excluding articles of commerce (or persons) the exclusion of which (or whom) is reasonably related to the protection of a legitimate state interest.⁴⁵ Inspection is, however, more frequently made a condition precedent to the sale or use of the article within a state so far as concerns articles introduced into it from another state or foreign country. This is valid so far as it is a reasonable means for protecting the general health, safety, morals or welfare of the state. Inspection may be required whether the goods are to be sold within the state in the original package or after they have been incorporated in the general mass of property within the state.⁴⁶ It has been intimated that the state's power of inspection over goods shipped into it for personal use is less than if they are intended to be sold with-

⁴² *Oregon-Washington R. & Nav. Co. v. Washington*, 270 U.S. 87, 46 S. Ct. 279, 70 L.Ed. 482.

⁴³ U.S.C.A.Const. Art. 1, Section 10.

⁴⁴ *D. E. Foote & Co. v. Stanley*, 232 U.S. 494, 34 S.Ct. 377, 58 L.Ed. 698; *Turner v. Maryland*, 107 U.S. 38, 2 S.Ct. 44, 27 L.Ed. 370.

⁴⁵ *Reid v. People of State of Colo-*

rado, 187 U.S. 137, 23 S.Ct. 92, 47 L.Ed. 108; *Morgan's L. & T. R. & S. S. Co. v. Louisiana Board of Health*, 118 U.S. 455, 6 S.Ct. 1114, 30 L.Ed. 237.

⁴⁶ *Askren v. Continental Oil Co.*, 252 U.S. 444, 40 S.Ct. 355, 64 L.Ed. 654; *Savage v. Jones*, 225 U.S. 501, 32 S.Ct. 715, 56 L.Ed. 1182.

in it.⁴⁷ The basis for the distinction is not very substantial since the evils against which a state may protect itself will generally result from the ultimate use of the article. The requirement of inspection in the case of articles intended to be shipped outside of the state is valid under the same general principles as apply to goods introduced into a state, although the interests to be protected differ from those intended to be safeguarded by inspection of the latter. In one such case inspection was required to aid in preventing the theft of the article,⁴⁸ while in another its aim seems to have been to protect the outside markets of the domestic product.⁴⁹

Inspection Laws Discriminating Against Interstate or Foreign Commerce

The courts have recognized that state inspection laws furnish a convenient cloak for burdening interstate and foreign commerce in order to achieve objectives that a state may not legitimately promote at their expense. They have, therefore, held invalid state laws that purport to be inspection laws if their real purpose is to gain a benefit for local trade, industry, or agriculture at the expense of interstate or foreign commerce. The two most common devices employed to attain this objective are the enactment and enforcement of inspection laws the purpose or practical effect of which is to restrict or destroy such commerce, and their taxation under the guise of imposing inspection fees thereon. Statutes of the former type usually involve discrimination against such commerce. The discrimination is obvious where inspection is limited to articles produced outside of the state and sold within it, and a statute so limiting inspection is invalid for conflict with the commerce clause.⁵⁰ A statute requiring inspection for meat products sold within the state only if derived from animals slaughtered more than one hundred miles from the place of sale in practical effect discriminates against the sale within the state of the meat products of other states and imposes an invalid burden upon interstate commerce.⁵¹ An inspection statute that in terms applies to all articles of a given class sold within the state,

⁴⁷ *Vance v. W. A. Vandercook Co.*, 170 U.S. 438, 18 S.Ct. 674, 42 L.Ed. 1100.

⁴⁸ *Territory of New Mexico ex rel. E. J. McLean v. Denver & R. G. R. Co.*, 203 U.S. 38, 27 S.Ct. 1, 51 L.Ed. 78.

⁴⁹ *Turner v. State of Maryland*, 107 U.S. 38, 2 S.Ct. 44, 27 L.Ed. 370.

⁵⁰ *Voight v. Wright*, 141 U.S. 62, 11 S.Ct. 855, 35 L.Ed. 638.

⁵¹ *Brimmer v. Rebman*, 138 U.S. 78, 11 S.Ct. 213, 34 L.Ed. 862.

whether produced within or without the state, will be invalid if the required inspection is of such character, or is burdened with such conditions, as will in fact produce a discrimination against interstate or foreign commerce. The case of *Minnesota v. Barber*⁵² involved a statute of that character. The statute prohibited the local sale of certain meat products for human consumption unless derived from animals whose soundness and health had been ascertained by a local inspection made within twenty-four hours prior to their slaughter. The practical effects of its enforcement would have been the exclusion from the state's markets of meat products derived from animals slaughtered outside of the state, and the concentration within the state of the processing of all such meat products sold within it. The inevitable discrimination against interstate commerce that would have resulted from its enforcement made its enforcement invalid for conflict with the commerce clause. The factor emphasized by the courts in these cases was the discrimination against interstate and foreign commerce by the enforcement of the several statutes involved in them.

The commerce clause, however, protects interstate and foreign commerce against other burdensome state regulations than those that discriminate against them. A non-discriminatory state inspection requirement may be violative of the commerce clause if it unduly burdens such commerce. The cases dealing with state inspection fees illustrate that.⁵³ The principles developed in the cases involving inspection laws apply also where inspection is required before domestic products may be shipped in interstate or foreign commerce, although it is practically inconceivable that such inspection would ever involve a discrimination against articles produced in other states resulting from the sole action of the state requiring such inspection.

Inspection Fees—Foreign Imports and Exports

A state may charge an inspection fee for the service performed in making the inspection, and most inspection statutes provide for the payment of such fee.⁵⁴ The Constitution specifically

⁵² 136 U.S. 313, 10 S.Ct. 862, 34 L. Ed. 455.

⁵³ See *Vance v. W. A. Vandercook Co.*, 170 U.S. 438, 18 S.Ct. 674, 42 L.Ed. 1100, which holds invalid an extremely burdensome condition imposed on the right to ship intoxicants

into a state for use therein which the state had sought to sustain as an inspection law. The Court did not consider it a true inspection law, but intimated that it would be invalid even if considered to be such.

⁵⁴ *Patapsco Guano Co. v. North*

provides that a state may, without the consent of Congress, lay imposts or duties upon imports and exports to the extent that doing so may be absolutely necessary for the execution of its inspection laws.⁵⁵ This provision has no application to goods introduced into a state from another state or to those shipped from one state into another. Its scope is limited to imports from, and exports to, a foreign country.⁵⁶ There may at times exist a question as to whether a state statute that exacts a payment in connection with the importation or exportation of goods is an inspection law or a disguised attempt to levy prohibited imposts or duties thereon. If, however, the statute is construed to be a bona fide inspection law, the payment is deemed an inspection fee and valid if not in excess of what is absolutely necessary for the execution of such law.⁵⁷ It has been stated that it would be void if it exceeded the amount so needed for the execution of such law.⁵⁸ The same provision of the Constitution that permits a state to impose inspection fees as an incident to the inspection of imports and exports provides that "the net produce of all duties and imposts, laid by any state on imports and exports, shall be for the use of the treasury of the United States," and that all laws laying any such imposts or duties shall "be subject to the revision and control of Congress." These provisions in terms extend to all such imposts and duties, including those laid to defray the absolutely necessary expenses of executing a state's inspection laws so far as they apply to imports and exports. It is debatable whether this involves the consequence that the issue whether they exceed in amount that "absolutely necessary" for executing those inspection laws is one the ultimate determination of which lies with Congress rather than the courts. This view appears to have support in judicial dictum.⁵⁹ It is, however, difficult to reconcile with the view, also supported by judicial dic-

Carolina Board of Agriculture, 171 U.S. 345, 18 S.Ct. 862, 43 L.Ed. 191.

⁵⁵ U.S.C.A.Const. Art. 1, Section 10.

⁵⁶ Territory of New Mexico ex rel. E. J. McLean v. Denver & R. G. R. Co., 203 U.S. 38, 27 S.Ct. 1, 51 L.Ed. 78.

⁵⁷ Neilson v. Garza, Fed.Cas.No. 10,091.

⁵⁸ Neilson v. Garza, Fed.Cas.No. 10,091.

⁵⁹ Neilson v. Garza, Fed.Cas.No. 10,091. Quere whether Congress is limited, in revising a state inspection fee on exports, by the prohibition of U.S.C.A.Const. Article 1, Section 9, that it shall lay no tax or duty on articles exported from any state, and whether, if it is, it would be violating that provision by fixing the fee at an amount in excess of that "absolutely necessary" for the execution of the state's inspection law?

tum, that such fees would be void if in excess of that "absolutely necessary" for executing a state's inspection of imports and exports.⁶⁰ It may be that a basis for their reconciliation can be found by making the amount of the fee a decisive factor in determining whether the statute exacting the fee is really an inspection law.

Inspection Fees—Interstate Imports and Exports

The provision last considered has no application to state inspection fees imposed on articles coming into one state from another state or shipped from the former into the latter. The amount of the fee is in such cases limited by the principles protecting interstate commerce from being directly burdened by the action of a state. The problem is frequently formulated as that of preventing a state from levying a prohibited tax upon interstate commerce under the guise of imposing an inspection fee thereon. It has been stated that the amount of the fee is not a judicial question unless so unreasonable and disproportionate to the cost of the service as to raise an inference that the statute is not really an inspection law.⁶¹ It is immaterial whether judicial review of inspection fees be viewed in that, or some other manner. It has long been, and continues to be, a recognized practice. The established rule is that such fees may not, over any considerable period, materially exceed the costs of making the required inspection.⁶² The cases are few in which their excessive character can be determined without investigating their actual operation, although they may be declared invalid if their unreasonableness is clear from the face of the statute imposing them. The factor that has been generally relied upon to establish this before experience has demonstrated it has been that the state has imposed upon one set of officials inspection and other duties not a part thereof and paid the whole or a part of the joint expenses from the proceeds of the inspection fees. This does not conclusively prove the fees to be excessive, but has, however, been held to give rise to a presumption of their invalidity and to put the burden of showing that the fees do not materially exceed the cost of inspection upon those seeking to collect the al-

⁶⁰ Neilson v. Garza, Fed.Cas.No. 10,091.

⁶¹ Territory of New Mexico ex rel. E. J. McLean v. Denver & R. G. R. Co., 203 U.S. 38, 27 S.Ct. 1, 51 L.Ed. 78.

⁶² D. E. Foote & Co. v. Stanley, 232 U.S. 494, 34 S.Ct. 377, 58 L.Ed. 698; Standard Oil Co. v. Graves, 249 U.S. 389, 39 S.Ct. 320, 63 L.Ed. 662. Quere whether the costs must be reasonable?

leged fee.⁶³ The validity of fees is in most cases determined only on the basis of their actual results. A state legislature is not required in the first instance to do more than reach a rough equivalence between the amount of the fee and the cost of inspection. Courts do not usually interfere immediately merely because the fee exceeds the expense of inspection, but usually accord the legislature a reasonable opportunity to reduce the fee to a reasonable amount.⁶⁴ If it fails to make the requisite adjustment and continues the excessive fee in force, courts will declare it invalid.⁶⁵ A fee that is excessive is void in its entirety, and no part of it is collectible.⁶⁶ There is, however, no right to recover fees paid during the reasonable test period on the basis of their results during that period.⁶⁷ No case has been found determining whether excessive fees, paid after a reasonable test period has shown them to be such, are recoverable.

The system of inspection and inspection fees has been applied most frequently in connection with articles shipped into or out of the state. It is not, however, restricted thereto. It may be used to insure that property used within the state in interstate transportation is properly maintained for safe and efficient use therein. The amount of the fee that may be validly charged therefor is governed by the same principles that were set forth in the preceding paragraph.⁶⁸

⁶³ D. E. Foote & Co. v. Stanley, 232 U.S. 494, 34 S.Ct. 377, 58 L.Ed. 698; Great Northern Ry. Co. v. Washington, 300 U.S. 154, 57 S.Ct. 397, 81 L.Ed. 573.

⁶⁴ D. E. Foote & Co. v. Stanley, 232 U.S. 494, 34 S.Ct. 377, 58 L.Ed. 698; Pure Oil Co. v. State of Minnesota, 248 U.S. 158, 39 S.Ct. 35, 63 L.Ed. 180.

⁶⁵ D. E. Foote & Co. v. Stanley, 232 U.S. 494, 34 S.Ct. 377, 58 L.Ed. 698; Standard Oil Co. v. Graves, 249

U.S. 339, 39 S.Ct. 320, 63 L.Ed. 662; Phipps v. Cleveland Refining Co., 261 U.S. 449, 43 S.Ct. 418, 67 L.Ed. 739.

⁶⁶ Great Northern Ry. Co. v. Washington, 300 U.S. 154, 57 S.Ct. 397, 81 L.Ed. 573.

⁶⁷ Pure Oil Co. v. State of Minnesota, 248 U.S. 158, 39 S.Ct. 35, 63 L.Ed. 180.

⁶⁸ Great Northern Ry. Co. v. Washington, 300 U.S. 154, 57 S.Ct. 397, 81 L.Ed. 573.

STATE REGULATION OF INTERSTATE TRANSPORTATION

157. A state is prohibited by the commerce clause from completely denying to any person the right to engage in interstate transportation within it, but it may, so far as not in conflict with federal regulations, subject the exercise of that right to reasonable regulation even though this involve a limited prohibition of interstate transportation.

The right to engage in interstate commerce within a state, whether conceived as derived or not derived from the Constitution,⁶⁹ is protected thereby against certain forms of state action. The quarantine and inspection law cases show, however, that its exercise is not immune to certain forms of state regulation. There was a long period during the nation's history when Congress made very slight use of its powers to regulate it, and during which state regulation of many of its phases was a common practice. This included the regulation of many phases of interstate transportation and navigation. Congress has not even yet assumed complete control over these activities, with the result that the states have continued to exercise a considerable measure of control over them. The validity of many of these past and present attempts at their regulation by the states has been adjudicated. The result is a vast body of specific decisions defining the area of permissible state regulation of interstate transportation and navigation in the absence of federal regulation thereof. The general principle applied in them all is that state regulation that directly burdens such transportation is invalid while that which merely affects it indirectly is valid. The decisions, therefore, help to definitize the meaning of those conceptions and have value as such.

The Right of Persons to Engage in Interstate Transportation Within a State

A state may not completely deny to any person the right to engage in interstate transportation within it. It may not confer a monopoly thereof upon any person even though it is confined to one method of transportation, since that would involve a

⁶⁹ See for the view that it is not derived from the Constitution, GIBBONS v. OGDEN, 9 Wheat. 1, 6 L.Ed. 23, Black's Cas. Constitutional Law,

2d, 222; for the view that it is, Crutcher v. Commonwealth of Kentucky, 141 U.S. 47, 11 S.Ct. 851, 35 L.Ed. 649.

denial, to that extent, of the right of others to engage therein.⁷⁰ The ultimate basis for this position would equally invalidate any attempt on the part of the state itself to assume a monopoly of interstate transportation within its borders. Interstate ferries seem at one time to have constituted a limited exception to the general rule in that a state was held empowered to confer an exclusive right of ferriage from its side of the river but to be without power to prevent the landing within it of goods and persons transported from the opposite side.⁷¹ This position has long since been abandoned by subjecting such ferries to the general rule.⁷² State legislation requiring interstate carriers by bus or truck, that operate over the state's highway system, to obtain a certificate of convenience and necessity from designated state officials before engaging in interstate transportation violates the commerce clause if the purpose of the requirement is to prevent competition.⁷³ It cannot be sustained as a valid regulation of the use of the state's highways since its aim is not to regulate the manner of their use but to determine who shall be permitted to use them. It thus amounts to an attempt by a state to determine who shall be permitted to engage in interstate transportation within it, and imposes a direct and invalid burden upon interstate commerce. A requirement of that character is probably valid if it is reasonably necessary to promote safety on the state's highways.⁷⁴ A state is equally prevented from determining who shall be permitted to engage in interstate transportation within it by requiring a license as a condition precedent thereto unless the requirement can be justified as a proper safety measure or as an incident to controlling the use of facilities furnished by it.⁷⁵ Its power to exact a license fee for the exercise of that right is similarly limited.⁷⁶ The Supreme Court has rigorously en-

⁷⁰ *GIBBONS v. OGDEN*, 9 Wheat. 1, 6 L.Ed. 23, Black's Cas. Constitutional Law, 2d, 222.

⁷¹ *Conway v. Taylor's Executors*, 1 Black 603, 17 L.Ed. 191.

⁷² *City of Sault Saint Marie v. International Transit Co.*, 234 U.S. 333, 34 S.Ct. 826, 58 L.Ed. 1337, 52 L.R.A., N.S., 574.

⁷³ *Buck v. Kuykendall*, 267 U.S. 307, 45 S.Ct. 324, 69 L.Ed. 623, 38 A.L.R. 286. The same decision was made in *Bush & Sons v. Maloy*, 267 U.S. 317, 45 S.Ct. 326, 69 L.Ed. 627,

which differed from the case first cited only in that the state highways, the right to operate over which was involved therein, had been constructed without federal aid.

⁷⁴ *Bradley v. Public Utilities Commission of Ohio*, 289 U.S. 92, 53 S.Ct. 577, 77 L.Ed. 1053, 85 A.L.R. 1131.

⁷⁵ *City of Sault Saint Marie v. International Transit Co.*, 234 U.S. 333, 34 S.Ct. 826, 58 L.Ed. 1337, 52 L.R.A., N.S., 574.

⁷⁶ *Barrett v. New York City*, 232 U.S. 14, 34 S.Ct. 203, 58 L.Ed. 483.

forced the view that the commerce clause was intended to deprive the states of power to impede interstate commerce by limiting the right to engage therein to those selected or determined by them in accordance with their frequently narrow and divergent policies.

State Regulation of Interstate Railroad Operations

The inability of a state to condition the right to conduct interstate transportation within it on its consent has not prevented it from subjecting its exercise to a wide variety of regulation. There has been ample judicial recognition of its power to promote public safety and welfare within its borders so far as this could be done without imposing too heavy a burden upon interstate commerce. It may regulate the speed of interstate trains,⁷⁷ and require them to slow down at railroad crossings.⁷⁸ The latter requirement was, however, held to impose an invalid burden upon interstate commerce when applied to a railroad line with one hundred and twenty-four crossings in one hundred and twenty-three miles, no one of which was particularly dangerous, and where compliance would have doubled the running time of interstate trains using that line.⁷⁹ The safety of operations may be promoted by requiring locomotive engineers, including those operating interstate trains, to be examined to determine their fitness, and to be licensed.⁸⁰ Statutes prescribing minimum train crews for trains operating in interstate commerce have been sustained as proper safety measures.⁸¹ Considerations of the same general type have led courts to sustain state legislation regulating the relations of carriers and their employees. A statute requiring them to make semi-monthly payment of wages due employees is valid even as applied to employees engaged in interstate transportation,⁸² as is one that abolishes contributory

⁷⁷ *Erb v. Morasch*, 177 U.S. 584, 20 S.Ct. 819, 44 L.Ed. 897.

⁷⁸ *Southern Ry. v. King*, 217 U.S. 524, 30 S.Ct. 594, 54 L.Ed. 868.

⁷⁹ *Seaboard Air Line R. Co. v. Blackwell*, 244 U.S. 310, 37 S.Ct. 640, 61 L.Ed. 1160, L.R.A.1917F, 1184.

⁸⁰ *Smith v. State of Alabama*, 124 U.S. 465, 8 S.Ct. 564, 31 L.Ed. 508; *Nashville, C. & St. Louis R. Co. v.*

State of Alabama, 128 U.S. 96, 9 S.Ct. 28, 32 L.Ed. 352.

⁸¹ *Chicago, R. I. & P. R. Co. v. State of Arkansas*, 219 U.S. 453, 31 S.Ct. 275, 55 L.Ed. 290; *St. Louis, I. M. & S. R. Co. v. State of Arkansas*, 240 U.S. 518, 36 S.Ct. 443, 60 L.Ed. 776.

⁸² *Erie R. Co. v. Williams*, 233 U.S. 685, 34 S.Ct. 761, 58 L.Ed. 1155, 51 L.R.A.,N.S., 1097.

negligence as a defense even as applied to injuries occurring while the employees are engaged in interstate commerce.⁸³ No valid burden on interstate commerce results from prescribing proper equipment for locomotives running through a state,⁸⁴ nor from prohibiting the use of stoves to heat even those passenger cars that are used for interstate commerce.⁸⁵ State regulations intended to insure adequate service have been frequently sustained. Statutes requiring trains to stop at specified classes of stations for taking on and discharging passengers have been held valid where the effect of their application was to provide reasonably adequate service, even though this required the stoppage of local trains carrying interstate passengers and of interstate trains running through the state.⁸⁶ Requiring railroads to furnish additional service to communities already provided with adequate local service imposes an invalid burden upon interstate commerce.⁸⁷ Nor may a state compel an interstate train to turn aside from its direct route to accommodate a small town on a branch line,⁸⁸ nor in effect prohibit such train from waiting for its connections at junction points by penalizing them for failure to comply with their time schedules within the state.⁸⁹ The duty to exchange cars carrying interstate freight may be imposed in order to expedite the service.⁹⁰ A state may impose

⁸³ *Missouri Pacific R. Co. v. Castle*, 224 U.S. 541, 32 S.Ct. 606, 56 L.Ed. 875.

⁸⁴ *Atlantic Coast Line R. Co. v. State of Georgia*, 234 U.S. 280, 34 S.Ct. 829, 58 L.Ed. 1312; *Vandalia R. Co. v. Public Service Commission of Indiana*, 242 U.S. 255, 37 S.Ct. 93, 61 L.Ed. 276. The federal government has now occupied this field of regulation; *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 47 S.Ct. 207, 71 L.Ed. 432.

⁸⁵ *New York, N. H. & H. R. Co. v. People of State of New York*, 165 U.S. 628, 17 S.Ct. 418, 41 L.Ed. 853.

⁸⁶ *Gladson v. State of Minnesota*, 166 U.S. 427, 17 S.Ct. 627, 41 L.Ed. 1064; *Lake Shore & M. S. R. Co. v. State of Ohio*, 173 U.S. 285, 19 S.Ct. 465, 43 L.Ed. 702.

⁸⁷ *Cleveland, C., C. & St. L. R. Co. v. People of State of Illinois*, 177 U.

S. 514, 20 S.Ct. 722, 44 L.Ed. 868; *Mississippi Railroad Comm. v. Illinois C. R. Co.*, 203 U.S. 335, 27 S.Ct. 90, 51 L.Ed. 209; *Atlantic Coast Line R. Co. v. Wharton*, 207 U.S. 328, 28 S.Ct. 121, 52 L.Ed. 230; *Herndon v. Chicago, R. I. & P. R. Co.*, 218 U.S. 135, 30 S.Ct. 633, 54 L.Ed. 970; *Chicago, B. & Q. R. Co. v. Railroad Commission of Wisconsin*, 237 U.S. 220, 35 S.Ct. 560, 59 L.Ed. 926.

⁸⁸ *Illinois Cent. R. Co. v. Illinois*, 163 U.S. 142, 16 S.Ct. 1096, 41 L.Ed. 107; *St. Louis & S. F. R. Co. v. Public Service Commission of Missouri*, 254 U.S. 535, 41 S.Ct. 192, 65 L.Ed. 389.

⁸⁹ *Missouri, K. & T. R. Co. of Texas v. Texas*, 245 U.S. 484, 38 S.Ct. 178, 62 L.Ed. 419, L.R.A.1918C, 535.

⁹⁰ *Missouri Pac. R. Co. v. Larabee Flour Mills*, 211 U.S. 612, 29 S.Ct. 214, 53 L.Ed. 352; but if enforce-

reasonable requirements for the furnishing of cars for interstate shipments.⁹¹ There are, in fact, but few phases of the carrier's duty to those whom it has undertaken to serve with interstate transportation that a state may not subject to reasonable regulation. Its laws may, so far as the commerce clause is concerned, regulate the liability of the carrier to an interstate shipper for loss or damage of the goods moving in interstate commerce if the injury occurred within it.⁹² Its power to apply the local law to this phase of interstate commerce exists whether that local law be statute or common law.⁹³ It may inflict penalties for the failure of carriers to comply with duties imposed upon them in connection with interstate shipments in every case in which it has the power to impose the duties.⁹⁴ This power has been frequently sustained when applied to the duty of telegraph companies to transmit or deliver interstate messages. Thus it is valid to impose a penalty for the failure promptly to transmit telegrams received within the state for transmission to another state, at least where the failure is due to negligence occurring within the state.⁹⁵ It is also valid to impose a penalty for failure to deliver promptly an interstate telegram received within the state,⁹⁶ but invalid to impose a penalty for the failure to promptly deliver in another state a telegram sent from a point within the state imposing the penalty.⁹⁷ A state law invalidating a contract limiting the liability of a telegraph company for failure to perform the duty owed by it to the sender or sendee of a telegram may validly apply to

ment of the requirement unduly burdens interstate commerce, it is invalid, *St. Louis S. W. R. Co. v. Arkansas*, 217 U.S. 136, 30 S.Ct. 476, 54 L.Ed. 698, 29 L.R.A.,N.S., 802.

⁹¹ *Illinois Cent. R. Co. v. Mulberry Hill Coal Co.*, 238 U.S. 275, 35 S.Ct. 760, 59 L.Ed. 1306. An unreasonable state regulation of the duty to provide cars for interstate shipments violates the commerce clause, *U.S.C.A.Const. Art. 1, § 8, cl. 3: Houston & T. C. Ry. Co. v. Mayes*, 201 U.S. 321, 26 S.Ct. 491, 50 L.Ed. 772.

⁹² *Chicago, M. & St. P. R. Co. v. Solan*, 169 U.S. 133, 18 S.Ct. 289, 42 L.Ed. 688; *Pennsylvania R. Co. v.*

Hughes, 191 U.S. 477, 24 S.Ct. 132, 48 L.Ed. 268.

⁹³ *Western Union Tel. Co. v. Call Publishing Co.*, 181 U.S. 92, 21 S.Ct. 561, 45 L.Ed. 765.

⁹⁴ *Atlantic Coast Line R. Co. v. Mazursky*, 216 U.S. 122, 30 S.Ct. 378, 54 L.Ed. 411.

⁹⁵ *Western Union Tel. Co. v. Crovo*, 220 U.S. 364, 31 S.Ct. 399, 55 L.Ed. 498.

⁹⁶ *Western Union Tel. Co. v. James*, 162 U.S. 650, 16 S.Ct. 934, 40 L.Ed. 1105.

⁹⁷ *Western Union Tel. Co. v. Pendleton*, 122 U.S. 347, 7 S.Ct. 1126, 30 L.Ed. 1187.

interstate telegrams sent from points within the state.⁹⁸ These decisions show clearly that the commerce clause allows the states a wide area within which they are permitted to exercise their police power to protect local interests which might be adversely affected if certain aspects of interstate transportation were left unregulated until Congress intervened to do so. Their regulations are invalid for conflict with the commerce clause only if they exceed the reasonable necessities for protecting the local interest or aim to protect local interests so as to procure a local advantage at the expense of interstate commerce. Many of the specific matters involved in the decisions herein cited are now regulated by federal statutes that have superseded those state regulations in whole or in part. The decisions, however, still furnish useful guides for defining the limits of legitimate state regulation of interstate transportation.⁹⁹

State Regulation of Interstate Transportation by Motor Vehicles

The development of interstate transportation by motor bus and motor truck has produced a vast body of state legislation aimed at its regulation. The factor that differentiates the problem of its validity under the commerce clause from that of the validity of regulations applied to other modes of transportation is the use, in connection with these methods of transportation, of highways furnished, in whole or in part, at the expense of the state. This affords no basis for a state's denial of the right to use its highways for interstate commerce for the purpose of reducing competition by requiring a person to obtain from the state a certificate of convenience and necessity before being permitted to use its highways for that purpose.¹ It has, however, been stated that the commerce clause would not be violated if the denial of a certificate could be shown to be necessary to promote the public safety.² This was the basis for holding that the denial of a certificate to engage in interstate transportation over a particular highway was not a violation of the

⁹⁸ *Western Union Tel. Co. v. Commercial Milling Co.*, 218 U.S. 406, 31 S.Ct. 59, 54 L.Ed. 1088, 36 L.R.A., N.S., 220, 21 Ann.Cas. 815.

⁹⁹ *Missouri Pac. R. Co. v. Porter*, 273 U.S. 341, 47 S.Ct. 383, 71 L.Ed. 672; *Western Union Tel. Co. v. Speight*, 254 U.S. 17, 41 S.Ct. 11, 65 L.Ed. 104.

¹ *Buck v. Kuykendall*, 267 U.S. 307, 45 S.Ct. 324, 69 L.Ed. 623, 38 A.L.R. 286.

² *Bradley v. Public Utilities Commission of Ohio*, 289 U.S. 92, 53 S.Ct. 577, 77 L.Ed. 1053, 85 A.L.R. 1131.

commerce clause.³ There appear to have been other feasible routes in that case. The Court did not commit itself as to whether it would have decided the case in the same way if there had been no such other routes. It did, however, state that the state regulatory body was under no duty to offer an alternative route in its order denying a certificate for the route over which the applicant had wished to operate. It is clear, therefore, that a state may impose some conditions precedent to the use of its highways even for purposes of interstate transportation. The issue thus becomes that of defining the principles employed to determine the conditions that may, and those that may not, be validly imposed. The test is the extent of the burden upon interstate commerce that compliance therewith would involve, and that depends not only upon the extent of the factual burden but as well upon the importance of the state's interest that will be protected by compliance with it. A state may not require a private carrier to become a common carrier as a condition precedent to granting him a certificate to use its highways for interstate transportation;⁴ nor require any carrier, private, contract, or common, to carry insurance or furnish a bond to indemnify the interstate shipper or passenger.⁵ It may, however, require any such carrier to carry insurance or furnish a bond to indemnify any others who may be damaged as a result of its operations over the state's highways.⁶ The imposition of that requirement is deemed a valid means for promoting highway safety. The right to use a state's highways for interstate transportation may also be limited to vehicles that have been registered with its officials, and the right to operate such vehicles in such commerce may be restricted to drivers licensed by the state.⁷ The right of a non-resident to use a state's highways for such transportation may be validly conditioned upon his filing with a designated state official a consent to accept service upon said official for the commencement of actions aris-

³ *Bradley v. Public Utilities Commission of Ohio*, 289 U.S. 92, 53 S.Ct. 577, 77 L.Ed. 1038, 85 A.L.R. 1131.

⁴ *Michigan Public Utilities Commission v. Duke*, 266 U.S. 570, 45 S.Ct. 191, 69 L.Ed. 445, 36 A.L.R. 1105.

⁵ *Michigan Pub. Utilities Commission v. Duke*, 266 U.S. 570, 45 S.Ct. 191, 69 L.Ed. 445, 36 A.L.R. 1105; *Sprout v. South Bend*, 277 U.S. 163,

48 S.Ct. 502, 72 L.Ed. 833, 62 A.L.R. 45; *Johnson Transfer & Freight Lines v. Perry*, D.C., 47 F.2d 900; *Cobb v. Dep't of Public Works of State of Washington*, D.C., 60 F.2d 631.

⁶ *Hicklin v. Coney*, 290 U.S. 169, 54 S.Ct. 142, 78 L.Ed. 247.

⁷ *Hendrick v. Maryland*, 235 U.S. 610, 35 S.Ct. 140, 59 L.Ed. 385.

ing out of the non-resident's operation of his vehicle upon the state's highways.⁸ The statutes involved in the two decisions last cited were deemed promotive of the public safety. Restrictions that can reasonably be held conducive to highway safety are generally sustained, even where made a condition precedent to the use of the highways for purposes of interstate transportation.

State Fees for Use of State Highways

The fact that the highways have been furnished, in whole or in part, at the expense of the state is the basis for sustaining the exaction of fees for the privilege of using them. A state may impose such charge on those using its highways for purposes of interstate commerce as well as upon those using them for local transportation only. The charge is deemed compensation for the use of facilities furnished by it to those using them.⁹ The difficulty has been to prevent this right from being used as a disguised method for levying upon interstate commerce a tax which the commerce clause prohibits a state to impose thereon. A fee is valid under the commerce clause only if it represents a fair contribution to the cost of building and maintaining the highways. Since it is a direct burden upon interstate commerce, so far as it is exacted from those using the highways for purposes of interstate commerce, it must affirmatively appear that it is levied only as compensation.¹⁰ It may validly be based upon factors that reflect the extent of use made of the highways, such as the carrying capacity of the vehicles used in interstate commerce.¹¹ The conclusion that it was not levied as compensation for the use of the highways but as a license tax on interstate commerce was based in one case upon the facts that it was imposed by the state's general revenue act, that its proceeds were used for the state's general expenses although previously the state had placed the proceeds from fees intended to compensate it for the privilege of using its roads

⁸ *Kane v. State of New Jersey*, 242 U.S. 160, 37 S.Ct. 30, 61 L.Ed. 222.

⁹ *Clark v. Poor*, 274 U.S. 554, 47 S.Ct. 702, 71 L.Ed. 1199; *Interstate Transit, Inc. v. Lindsey*, 283 U.S. 183, 51 S.Ct. 380, 75 L.Ed. 953.

¹⁰ *Interstate Transit, Inc. v. Lindsey*, 283 U.S. 183, 51 S.Ct. 380, 75

L.Ed. 953. See *Ingels v. Morf*, 300 U.S. 290, 57 S.Ct. 439, 81 L.Ed. 653, for excellent discussion of this problem.

¹¹ *Hicklin v. Coney*, 290 U.S. 169, 54 S.Ct. 142, 78 L.Ed. 247; see *Prouty v. Coyne*, D.C., 55 F.2d 289 (holding invalid a fee based wholly on weight of the vehicles).

in a special road fund, and that there was no relation between the amount of the charge and the extent of use of the roads.¹² A fee may, however, be valid even though the proceeds are not directly applied to road maintenance, if the manner of its collection clearly identifies it as a charge for the privilege of using the highways.¹³ The amount of the charge is frequently a decisive factor in determining its character and validity.¹⁴ A fee that discriminated against those who use the road for interstate commerce would be invalid on that account alone, but discrimination is not proved by showing that interstate users are taxed by a different method than intrastate users of the highways.¹⁵ The commerce clause permits a state to impose more than one form of charge, but the total levied may not exceed a reasonable compensation for the use of the highways.¹⁶ Whether all, or some only, of the several levies would be invalid where their total was excessive has not been determined. There is authority for the view that the fee may also cover the cost of policing the traffic.¹⁷ The Supreme Court has never discussed in detail just what cost items may be included in determining whether the fee is compensatory merely or a disguised levy of a prohibited tax.

State Highway Safety and Conservation Measures

A state has broad powers to regulate the actual operation of motor vehicles using its highways for interstate transportation. Regulations of the character sustained in the case of railroads would be equally valid when applied to motor vehicles so far as the commerce clause is concerned. A state's interest in preserving its roads justifies it in fixing maximum loads, and its interest in maintaining highway safety justifies it in fixing maximum widths for vehicles operating upon them and regulating the speed at which they may travel. The accomplishment

¹² *Interstate Transit, Inc. v. Lindsey*, 283 U.S. 183, 51 S.Ct. 380, 75 L.Ed. 953.

¹³ *Morf v. Bingaman*, 298 U.S. 407, 56 S.Ct. 756, 80 L.Ed. 1245.

¹⁴ *Clark v. Poor*, 274 U.S. 554, 47 S.Ct. 702, 71 L.Ed. 1199 (size of fee held to show its validity); *Sprout v. South Bend*, 277 U.S. 163, 48 S.Ct. 502, 72 L.Ed. 833, 62 A.L.R. 45 (size

of fee held to show invalidity of the exaction).

¹⁵ *Interstate Busses Corp. v. Blodgett*, 276 U.S. 245, 48 S.Ct. 230, 72 L.Ed. 551.

¹⁶ *Interstate Busses Corp. v. Blodgett*, 276 U.S. 245, 48 S.Ct. 230, 72 L.Ed. 551.

¹⁷ *Morf v. Bingaman*, 298 U.S. 407, 56 S.Ct. 756, 80 L.Ed. 1245.

of those ends requires the enforcement of such regulations against both interstate and intrastate traffic. The commerce clause does not prevent their application to the former though they in fact impose a direct burden upon it.¹⁸ The Supreme Court has consistently refused to substitute its views for those of the legislatures as to the details of such regulations. Its position is not that it is wholly powerless to do so, but rather that it is not its proper function to do so as long as the legislative choices remain within the fairly debatable range of reasonableness. It would not hesitate to declare such regulations invalid if they were so extreme as to impose a practically impossible burden upon interstate traffic and went beyond what was reasonably required to promote the public safety and the economical use of the roads. A state may also promote public convenience and safety by prescribing reasonable routes and fixing terminals for interstate busses operating over the public streets of a city, but may not debar them from using those used by them at a given time without making reasonable and adequate provision for others.¹⁹ It may be noted that, while much of the regulation of interstate motor vehicle traffic has been sustained by invoking the state's right to control the use of its streets and highways, much of it would be equally valid if applied to such vehicles operating over private rights of way.

A state's control over the intrastate operation of motor vehicles within it is limited to some extent by the commerce clause. There is no reason for excluding this matter from the local matters whose regulation is limited by the principle that it may not impose a direct burden upon interstate commerce. It has thus far been held that a certificate of convenience and necessity for intrastate operations may be validly required of an operator engaged within the state in both interstate and intrastate transportation.²⁰ The Supreme Court, however, intimated in that case that conditions might arise under which the denial of a right to conduct intrastate traffic might be invalid as an undue burden upon the interstate traffic. A denial of the right to

¹⁸ *Morris v. DUBY*, 274 U.S. 135, 47 S.Ct. 548, 71 L.Ed. 966; *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 58 S.Ct. 510, 82 L.Ed. 734.

¹⁹ *Phillips v. Moulton*, D.C., 54 F. 2d 119. For similar decision involving duty to permit adequate terminal

facilities for an interstate ferry, see *Mayor, Etc., of Vidalia v. McNeely*, 274 U.S. 676, 47 S.Ct. 758, 71 L.Ed. 1292.

²⁰ *Interstate Busses Corp. v. Holyoke St. Ry. Co.*, 273 U.S. 45, 47 S.Ct. 298, 71 L.Ed. 530.

carry interstate passengers as a penalty for carrying intrastate passengers in violation of state law violates the commerce clause.²¹ The enforcement of a valid requirement may not be secured by an unconstitutional method.

State Regulation of Interstate Telegraph Services

There are certain phases of interstate transportation that a state has almost invariably been denied the power to regulate. It may not require a telegraph company to deliver stock quotations, transmitted by it in interstate commerce to brokers selected by it with the approval of the stock exchange, to persons whom the exchange has failed to approve.²² The local delivery is an integral part of the interstate transmission of the quotations, and the effect of the state's regulation was in substance to determine the persons with whom the exchange was required to engage in interstate commerce. The state has no more power to require those without its borders to engage in interstate commerce with persons within it than it has to prohibit the former from engaging in such commerce with the latter, and its power in this matter is not increased merely because the non-resident has undertaken to engage in such commerce with some residents of the state. A different case would have existed had the state in which the exchange was located required the telegraph company to make similar arrangements with another exchange located within it. The issue would then have been as to the state's power to regulate the duty of interstate carriers operating within it to serve the local public demanding interstate service; the issue would not have been as to that state's power to require a person within it to engage in interstate commerce with one without the state. Its power to regulate the former to some extent was recognized in cases involving railroads which have already been discussed; its lack of power to impose the latter requirement follows from the theory on which the case last cited was decided.

Segregation of Races in Interstate Traffic

A state may require common carriers to provide separate accommodations for its intrastate passengers belonging to different races, even though such carriers are also engaged in inter-

²¹ *Atlantic-Pacific Stages v. Stahl*, D.C., 36 F.2d 260.

²² *Western Union Tel. Co. v. Foster*, 247 U.S. 105, 38 S.Ct. 438, 62 L.Ed. 1006, 1 A.L.R. 1278.

state commerce.²³ It is, however, the general rule that it may not require the segregation of the races in interstate commerce, and a statute requiring it for all passengers has been held to violate the commerce clause.²⁴ The decision was supported by the argument that an undue burden might be imposed on interstate commerce if the states were granted this power since different states might adopt conflicting rules with respect thereto. A segregation statute has, however, been sustained as applied to a street railway company whose principal business consisted of carrying interstate passengers.²⁵ It was held that, under the circumstances existing in that case, the regulation did not subject interstate commerce to unreasonable demands and affected it only indirectly. The differences between the situation in which the burden resulting from such legislation is deemed undue, and that in which it is deemed reasonable, were largely differences in degree of burden. The problem with which these segregation statutes dealt has been met in part by the voluntary adoption of the principle of race segregation by the carriers themselves. They are permitted to do this in the absence of state or federal legislation prohibiting it.²⁶

State Regulation of Rates

The regulation of the rates of interstate transportation is vested in Congress, and its power to fix them is, with minor exceptions, exclusive. It has exercised this power in the case of interstate transportation by railroad. The states made frequent attempts at direct and indirect regulation of those rates prior to the exertion by Congress of its power to fix them. These have invariably been held violative of the commerce clause.²⁷ A state's absence of power extends not merely to a direct fixing of the rates for interstate traffic, but also to regulating the rate for that part of an interstate journey that occurs within

²³ *Chesapeake & O. Ry. Co. v. Kentucky*, 179 U.S. 388, 21 S.Ct. 101, 45 L.Ed. 244.

²⁴ *Hall v. DeCuir*, 95 U.S. 485, 24 L.Ed. 547 (the passenger suing in this case was an intrastate passenger).

²⁵ *South Covington & C. St. Ry. Co. v. Commonwealth of Kentucky*, 252 U.S. 399, 40 S.Ct. 373, 64 L.Ed. 631.

²⁶ *Chiles v. C. & O. Ry. Co.*, 218 U.S. 71, 30 S.Ct. 667, 54 L.Ed. 936.

²⁷ *WABASH, ST. L. & P. RY. CO. v. PEOPLE OF STATE OF ILLINOIS*, 118 U.S. 557, 7 S.Ct. 4, 30 L.Ed. 244, *Black's Cas. Constitutional Law*, 2d, 271; *Louisville & N. R. Co. v. Eubank*, 184 U.S. 27, 22 S.Ct. 277, 46 L.Ed. 416; *Railroad Commission v. Worthington*, 225 U.S. 101, 32 S.Ct. 653, 56 L.Ed. 1004.

it.²⁸ It is prohibited not only from prescribing the exact rate permitted to be charged, but also from requiring a given relationship to be maintained between local and interstate rates.²⁹ It is sometimes difficult to determine whether a given movement is an independent intrastate movement or a mere continuation of an interstate journey, but if it is held to be the latter, the state may not fix the rate therefor.³⁰ It has even been held that it may not fix the rates for transportation between two points within it if any part of the route lies within another state.³¹ It is, however, permitted to regulate the rates for transportation between two points within it over a course traversing the high seas,³² although this is considered foreign commerce for purposes of federal control.³³ The reason for the distinction between these cases appears to be that the former would involve giving the state's law extraterritorial force within another state while the latter involves no such consequence. A major reason for denying a state the power to fix or regulate interstate rates is the confusion that might result if every state were permitted to exercise such power even over that part of the journey occurring within it. The maintenance of a unified control over the system of interstate rates is a matter of broad national interest. The subject-matter is one requiring uniformity of regulation throughout the nation. It is because interstate ferriage was viewed as a local matter not requiring national uniformity of rate regulation that the commerce clause has been construed to permit each of the states between which a ferry operates to fix the rates for trips commencing from its side of the river.³⁴ The state may also prescribe the rate for round-trip tickets sold within it if the ferry operator voluntarily

²⁸ *Railroad Commission v. Worthington*, 225 U.S. 101, 32 S.Ct. 653, 56 L.Ed. 1004.

²⁹ *WABASH, ST. L. & P. RY. CO. v. PEOPLE OF STATE OF ILLINOIS*, 118 U.S. 557, 7 S.Ct. 4, 30 L.Ed. 244, *Black's Cas. Constitutional Law*, 2d, 271; *Louisville & N. R. Co. v. Eubank*, 184 U.S. 27, 22 S.Ct. 277, 46 L.Ed. 416.

³⁰ See e. g., *Railroad Commission of Louisiana v. Texas & P. Ry. Co.*, 229 U.S. 336, 33 S.Ct. 837, 57 L.Ed. 1215; *Baltimore & O. S. W. R. Co. v.*

Settle, 260 U.S. 166, 43 S.Ct. 28, 67 L.Ed. 189.

³¹ *Hanley v. Kansas City Southern Ry. Co.*, 187 U.S. 617, 23 S.Ct. 214, 47 L.Ed. 333.

³² *Wilmington Transp. Co. v. Railroad Commission of California*, 236 U.S. 151, 35 S.Ct. 276, 59 L.Ed. 508.

³³ *Lord v. Goodall, N. & P. Steamship Co.*, 102 U.S. 541, 26 L.Ed. 224.

³⁴ *Port Richmond & Bergen Point Ferry Co. v. Board of Chosen Freeholders of Hudson County*, 234 U.S. 317, 34 S.Ct. 821, 58 L.Ed. 1330.

assumes to sell them, but a doubt has been expressed as to the validity of such a regulation if coupled with a requirement that round trip tickets be sold.³⁵ A statute fixing the toll rates for an interstate bridge for traffic bound both to and from the state fixing them violates the commerce clause.³⁶ This decision justifies the view that a state may not fix interstate ferriage rates if the journey commences in the other state. It probably has no power to fix ferriage rates at all where the ferriage is an integral part of a longer, continuous interstate journey.³⁷ The principles developed for interstate railroad transportation would be equally applicable to other forms of interstate transportation.

The development of pipe lines for the interstate transportation of gas and oil, and of power lines for the interstate transmission of electrical power, raised issues similar to those considered in the preceding paragraph. Both of these activities are transactions in interstate commerce, and their character as such is not altered by the mere passing of custody or title to the thing transported or transmitted at the state's boundary.³⁸ The cases that have been decided have involved (1) attempts by the state in which the gas and power were produced to fix the price to be paid by the distributing company to which they were delivered; (2) attempts by the state into which they were transmitted to fix the price to be paid by the distributing company to which they were delivered; (3) attempts by the latter state to fix the rate chargeable by the distributing company to local consumers; and (4) attempts by the latter state to fix the price payable by the local consumers within it where the gas or power were directly delivered to them by the producer although produced outside the state. Neither the state of origin of the gas or power, nor that in which it is delivered to the distributing company, may fix the prices thereof under the circumstances set forth in the two cases first referred to above.³⁹

³⁵ *Port Richmond & Bergen Point Ferry Co. v. Board of Chosen Freeholders of Hudson County*, 234 U.S. 317, 34 S.Ct. 821, 58 L.Ed. 1330.

³⁶ *Covington & C. Bridge Co. v. Com. of Kentucky*, 154 U.S. 204, 14 S.Ct. 1087, 38 L.Ed. 962.

³⁷ See *Port Richmond & Bergen Point Ferry Co. v. Board of Chosen Freeholders of Hudson County*, 234 U.S. 317, 34 S.Ct. 821, 58 L.Ed. 1330.

³⁸ *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.*, 273 U.S. 83, 47 S.Ct. 294, 71 L.Ed. 549.

³⁹ *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.*, 273 U.S. 83, 47 S.Ct. 294, 71 L.Ed. 549 (state of origin); *State of Missouri v. Kansas Natural Gas Co.*, 265 U.S. 298, 44 S.Ct. 544, 68 L.Ed. 1027 (state of delivery).

The sale by the distributing company operating within a state to its consumers located therein is a purely intrastate transaction, and that state may fix the rates therefor.⁴⁰ The direct delivery to the ultimate consumer under the circumstances of case (4) above is a transaction in interstate commerce. It is, however, deemed a local phase thereof not requiring uniformity of national treatment. The state in which the delivery is made may, therefore, fix the rates therefor.⁴¹ The state of origin of the gas or power would be prohibited from fixing such rate by the due process clause of the Fourteenth Amendment, and, probably, by the commerce clause as well. The principles developed in this and the preceding paragraph would define the extent of state control over rates for the interstate transmission of telegraphic, telephonic, and wireless messages. It should be noted that Congressional action could at any time supplant the limited state control over interstate rates possible under the foregoing principles. Furthermore, Congress has the power to supplant even intrastate rates so far as necessary to protect interstate commerce from injury due to a state's exercise of the power to fix intrastate rates.⁴²

STATE REGULATION OF EXPORT OF ITS NATURAL RESOURCES

158. A state may restrict, and in some instances, prohibit the export of goods produced within it if the restriction or prohibition is a reasonable means for promoting a legitimate local policy. It may not do so for the purpose of promoting a local policy which would defeat or interfere with that freedom of interstate trade and commerce which it was the purpose of the commerce clause to protect against hostile or burdensome state action.

Protection of Foreign Markets for State Products

The power of a state to prohibit interstate commerce as an incident to a valid quarantine has already been discussed. The

⁴⁰ Public Utilities Commission of Kansas v. Landon, 249 U.S. 236, 39 S.Ct. 268, 63 L.Ed. 577.

⁴¹ Pennsylvania Gas Co. v. Public Service Commission, Second District of State of New York, 252 U.S. 23, 40 S.Ct. 279, 64 L.Ed. 434.

⁴² See Railroad Commission of Wisconsin v. Chicago B. & Q. R. Co., 257 U.S. 563, 42 S.Ct. 232, 66 L.Ed. 371, 22 A.L.R. 1086. See Chapter 8, Sections 141-144.

most common purpose for its exercise in that connection has been the protection of the state's interests against dangers threatening them from the introduction of goods or persons from other states. States have at times attempted to prohibit, or subject to extremely burdensome conditions, the shipment of goods to other states. The validity of such attempts depends in large part upon their purpose. A statute prohibiting the interstate sale or shipment of fruits that were immature or otherwise unfit for human consumption has been held not to violate the commerce clause even though it directly affected interstate commerce.⁴³ Its validity was made to depend upon whether it was a reasonable means for accomplishing a legitimate state purpose. The raising of such fruits was an important industry of the state, and the purpose of the statute was the protection of the foreign market therefor as a means for protecting that industry. This is a legitimate interest that a state may promote even at the expense of interstate commerce. The fact that the prohibition applied only to articles considered to be not legitimate articles of trade and commerce was an important factor in sustaining this statute, and indicates the limits within which this method of regulation may be validly enforced. It should be noted that the fitness of articles cannot be determined except with reference to particular uses thereof. Fruit unfit for immediate human consumption might yet be fit for other uses. The instant case expressly declined to pass on the issue whether the statute could validly be applied to the shipment of such fruits intended for a use for which they were fit. The issue in such case would be whether the protection of the local industry for one market could validly be secured at the expense of interstate commerce in what would be a legitimate article of commerce as measured by the purposes for which it was intended to be used in another market without the state. A state may require the classification and grading of articles intended to be shipped to markets outside of the state,⁴⁴ but it is doubtful whether this could be so applied as to completely prevent the interstate shipment of articles fit for the uses for which they were being shipped.

⁴³ *SLIGH v. KIRKWOOD*, 237 U. S. 52, 35 S.Ct. 501, 59 L.Ed. 835, Black's Cas. Constitutional Law, 2d, 280.

⁴⁴ *Detweiler v. Welch*, D.C., 46 F. 2d 71, affirmed, 9 Cir., 46 F.2d 75, 73 A.L.R. 1440.

Conservation of a State's Natural Resources for Its Residents

The validity of state restrictions on the export of its natural resources has arisen frequently with respect to irreplaceable resources such as gas and oil. These are legitimate articles of commerce the exportation of which a state may not completely prohibit. It is as powerless to prevent their export by a refusal to exercise its powers as by an affirmative exercise thereof. An attempt to prevent it by denying the power of eminent domain to those who desired to export natural gas by pipe line violates the commerce clause.⁴⁵ The conservation of such resources for the people of the state is not among the legitimate purposes for which a state may impede interstate commerce. A state may not even accord its residents a preferred right to purchase natural gas produced within it over consumers in other states when this will necessarily involve the withdrawal of a large volume of the gas from an established interstate current.⁴⁶ Whether such a regulation would be valid if compliance therewith would merely prevent an expansion of a market outside the state has not been specifically determined, but this would seem to involve no less an interference with interstate commerce. The cases thus far considered involved resources that were privately owned. The applicable law with respect to the control of such resources, if owned and exploited by the state itself, has not been judicially considered. The answer might well depend upon whether the state would be considered as acting in a non-governmental capacity in the conduct of those activities. If that were held, it is quite probable that it would be subjected in regulating its performance thereof to the same limitations imposed on its regulation of their performance by private enterprise.

The remaining cases involving the validity of state action to conserve its natural resources by restricting their exportation

⁴⁵ *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 31 S.Ct. 564, 55 L. Ed. 716, 35 L.R.A.,N.S., 1193; see, also, *Haskell v. Kansas Natural Gas Co.*, 224 U.S. 217, 32 S.Ct. 442, 56 L. Ed. 738.

⁴⁶ *Com. of Pennsylvania v. West Virginia*, 262 U.S. 553, 43 S.Ct. 658, 67 L.Ed. 1117, 32 A.L.R. 300. Cf. *People's Natural Gas Co. v. Public Service Commission of Pennsylvania*, 270 U.S. 550, 46 S.Ct. 371, 70 L.Ed.

726 (sustaining an order requiring a producing company, acquiring its supply from gas fields within and without the state, to continue to supply a local distributing company, where it appeared that the producing company could comply by using only gas produced within the state). See dissenting opinion in case first cited for statement of the position in favor of permitting states to give preference to residents.

have concerned resources which are generally held to be owned by the state in trust for its people. The commerce clause does not prevent it from prohibiting or restricting the exportation of such resources where the purpose is to conserve them for the use of its own people. The prohibition of the exportation of domestic game,⁴⁷ and of the diversion of the waters of its streams for use by cities in another state,⁴⁸ have been sustained on that theory. The export of domestic game may also be validly conditioned on the payment of a license fee.⁴⁹ A state may not, however, regulate the right to export such resources in such manner as to benefit a local industry at the expense of business outside the state. A statute that in effect prohibits the exportation from the state of shrimp taken within it only as long as the shrimp had not been prepared for the consumers' market is not a conservation measure. Its purpose is to compel shrimp canners operating plants outside the state to move their plants into the state and thus promote the development of a local industry at the expense of that in other states. This violates the commerce clause.⁵⁰ The restrictions of that clause may not be evaded by giving such legislation the form of a grant of a qualified right of private property in the property held by the state in trust for its people. The same principle would undoubtedly apply to any property owned by a state, and prevent it from controlling its exportation so as to promote a shift of industry from other states to it. The decisions in this and the preceding paragraphs reveal the commerce clause as an effective instrument for the preservation and promotion of an economy of free trade within the United States.

⁴⁷ *Geer v. Connecticut*, 161 U.S. 519, 16 S.Ct. 600, 40 L.Ed. 793. See, also, *People of State of New York ex rel. Silz v. Hesterberg*, 211 U.S. 31, 29 S.Ct. 10, 53 L.Ed. 75 (statute prohibiting possession of game in state A during closed season therefor therein is not violative of commerce clause though applied to possession of game imported into state A).

⁴⁸ *Hudson County Water Co. v. Mc-*

Carter, 209 U.S. 349, 28 S.Ct. 529, 52 L.Ed. 858, 14 Ann.Cas. 560.

⁴⁹ *Lacoste v. Dep't of Conservation of Louisiana*, 233 U.S. 545, 44 S.Ct. 186, 68 L.Ed. 437.

⁵⁰ *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 49 S.Ct. 1, 73 L. Ed. 147; cf. *Bayside Fish Flour Co. v. Gentry*, 297 U.S. 422, 56 S.Ct. 513, 80 L.Ed. 772.

STATE REGULATION OF INTERSTATE COMMERCIAL INTERCOURSE

159. Interstate commerce includes interstate trade and commercial intercourse, and the commerce clause prohibits a state from unduly burdening either the buying or selling activities connected therewith.

Interstate commerce includes as an important branch thereof interstate commercial intercourse such as interstate buying and selling and interchange of commodities and services.⁵¹ States have at times enacted legislation regulating the purchase within them of goods for shipment and delivery to points beyond their boundaries. The activities connected with making such purchases, and entering into contracts therefor, are transactions in interstate commerce. A state may regulate the local phases of this activity if the character of the regulation is not unduly burdensome. It may require that grains received at elevators be weighed by public weighers wherever such officials are stationed even though the grain so received is being merely stored as an incident to its movement in interstate commerce, as shown by the usual course of the business.⁵² It may not limit the right to buy grain for interstate shipment to those whom it has licensed to do so, since it has no power to thus limit the right to conduct interstate commerce within it.⁵³ In the course of interstate trade in moving grain crops from the states in which they are produced to the terminal markets outside such states buying is by grade. It has been held to impose an undue burden upon this course of interstate commerce to prohibit the buying by grade unless the buyer had secured a grading license for himself or his agents. The imposition of such a requirement was held to involve a practical denial of the right to carry on interstate commerce in the only way in which it could in fact be conducted.⁵⁴ The prohibition of many other of the practices

⁵¹ GIBBONS v. OGDEN, 9 Wheat. 1, 6 L.Ed. 23, Black's Cas. Constitutional Law, 2d, 222; Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 42 S.Ct. 106, 66 L.Ed. 239; REAL SILK HOSIERY MILLS, INC. v. PORTLAND, 268 U.S. 325, 45 S.Ct. 525, 69 L.Ed. 982, Black's Cas. Constitutional Law, 2d, 284.

⁵² Merchants' Exchange of St.

Louis v. State of Missouri ex rel. Barker, 248 U.S. 365, 39 S.Ct. 114, 63 L.Ed. 300.

⁵³ Lemke v. Farmers' Grain Co., 258 U.S. 50, 42 S.Ct. 244, 66 L.Ed. 458.

⁵⁴ Shafer v. Farmers' Grain Co., 268 U.S. 189, 45 S.Ct. 481, 69 L.Ed. 909.

that had been developed in this trade, the regulation of the prices to be paid by purchasers, and the limitation of their profits, were also held to impose invalid burdens upon interstate commerce.⁵⁵ It is to be observed that the existence of that burden was determined by the fact that these regulations interfered with practices that were the product of private activities, not by whether the trade might reasonably have been required to adjust its practices to what the producing states deemed necessary to the protection of their interests. The factor that impressed the Court was the fact that the control of these activities concerned the people of other states as well as those of the grain producing states. The professed aim of such legislation has generally been to protect the farmer against exploitation by the grain trade. These cases must not, however, be construed to prevent a state from protecting sellers in interstate commerce by reasonable regulation of the activities of buyers.

State Regulation of Interstate Sales

States have been much more prone to hamper those wishing to engage within them in interstate selling than to interfere with buyers in interstate commerce. The enactment of statutes and ordinances to protect local products or local merchants has been a common practice, reflecting a widely held belief in the general benefits of protectionist devices. The inability of the states, due to the commerce clause, to achieve such protection by tariffs or other exercises of their taxing powers has led to widespread resort to regulatory measures to attain it. This has been a natural development since the commerce clause permits a considerable degree of state regulation not only of local matters whose regulation affects interstate commerce but of transactions in interstate commerce as well. A state may not prohibit the solicitation within it of orders for goods to be shipped into it from another state or a foreign country, nor the making of a contract of sale contemplating such shipment of goods into it. It may not exact a license or a license fee for the conduct of such activities within it, nor subject them to unduly burdensome restrictions. An ordinance imposing a license fee upon solicitors of orders for goods to be shipped into a state, and requiring them to furnish a bond if a deposit were required with the order, is in-

⁵⁵ *Lemke v. Farmers' Grain Co.*, 268 U.S. 189, 45 S.Ct. 481, 69 L.Ed. 258 U.S. 50, 42 S.Ct. 244, 66 L.Ed. 909.
458; *Shafer v. Farmers' Grain Co.*,

valid for that reason.⁵⁶ The delivery of goods in response to such orders or contracts may not be prohibited unless the prohibition can be justified as a valid quarantine law.⁵⁷ The goods so delivered may, however, be subjected to proper inspection. A state's power to regulate the various phases of this form of interstate interchange of goods is, however, exceedingly limited.

The "Original Package" Doctrine

The commerce clause protects not only those strictly interstate sales considered in the preceding paragraph, but also certain local sales of goods that have been shipped into a state for sale. A part of the law on this matter is embodied in the so-called "original package doctrine." This was first developed as a limit on the power of the states to tax foreign imports and their sale.⁵⁸ It no longer defines the limits on their power to tax interstate imports and their sale, but is still employed in determining the limits on their power of regulating the sale and use of such interstate imports. The sale of such an import in its original package is not a transaction in interstate commerce, but one that occurs after such commerce therein has come to an end.⁵⁹ It is protected by the commerce clause so far as this is necessary to prevent its regulation by the state from imposing an undue and unreasonable burden upon interstate trade. The prohibition of such sales with respect to goods that constitute the usual subjects of interstate trade would inevitably reduce the volume of such trade. The denial to the states of every power of regulating them would frequently defeat state policies at least as vital as the maintenance of freedom of interstate trade. The course of decisions has been largely determined by the need for reconciling these opposing interests. A state may

⁵⁶ *REAL SILK HOSIERY MILLS, INC. v. PORTLAND*, 268 U.S. 325, 45 S.Ct. 525, 69 L.Ed. 982, Black's Cas. Constitutional Law, 2d, 284. See *Jell-O-Co. v. Landes*, 9 Cir., 20 F.2d 120, which sustained an ordinance forbidding the peddling of samples or advertising matter without a license, even as applied to the trade in the city enacting the ordinance under a contract by which it agreed to distribute such samples and advertising.

⁵⁷ *Bowman v. Chicago & N. W. R.*

Co., 125 U.S. 465, 8 S.Ct. 689, 31 L.Ed. 700; *Rhodes v. Iowa*, 170 U.S. 412, 426, 18 S.Ct. 664, 42 L.Ed. 1088. Congress has a limited power to permit state prohibitory laws to operate on such transactions; In re *Rahrer*, 140 U.S. 545, 11 S.Ct. 865, 35 L.Ed. 572.

⁵⁸ *Brown v. Maryland*, 12 Wheat. 419, 6 L.Ed. 678.

⁵⁹ *WHITFIELD v. OHIO*, 297 U.S. 431, 56 S.Ct. 532, 80 L.Ed. 778, Black's Cas. Constitutional Law, 2d, 293.

not completely prohibit such sales of what have been described as legitimate articles of commerce such as intoxicating liquors⁶⁰ and unadulterated oleomargarine.⁶¹ Neither may it condition the right to make original package sales of such articles of commerce on compliance with conditions that would in fact completely destroy its value. A statute permitting such sales of oleomargarine only if it was of a pink color is in effect prohibitory, and invalid as an evasion of a lack of power to directly prohibit the sale of unadulterated oleomargarine.⁶²

A state may, however, prohibit original package sales to protect certain of its interests. Such sales of adulterated oleomargarine may be forbidden to protect a state's residents against fraud.⁶³ It could do the same to protect the health of its citizens if prohibition of such sales were reasonably necessary to achieve that end. It may not, however, prohibit such sales to protect locally produced products against competition from those produced in other states. A statute prohibiting such sales of milk purchased in another state unless the sellers had paid the foreign producers as much as they would have been required to pay local producers under a system of prices fixed by the state has been held invalid as an attempt to suppress or mitigate the consequences of competition between the states.⁶⁴ The Court rejected the view that one state could validly promote its economic welfare by thus neutralizing the "economic consequences of free trade among the states" which it was the aim of the commerce clause to protect at least against interference by the states. The view that such restriction might be justified as a health measure was rejected with the statement that that could be protected by more direct methods. It is well established that such sales may be subjected to reasonable inspection, and the payment of reasonable inspection fees, as fully as local sales made after the original package has been broken and the goods have been incorporated within the general mass of property within the state.⁶⁵

⁶⁰ *Leisy v. Hardin*, 135 U.S. 100, 10 S.Ct. 681, 34 L.Ed. 128; see *License Cases*, 5 How. 504, 12 L.Ed. 256.

⁶¹ *Schollenberger v. Com. of Pennsylvania*, 171 U.S. 1, 18 S.Ct. 757, 43 L.Ed. 49.

⁶² *Collins v. State of New Hampshire*, 171 U.S. 30, 18 S.Ct. 768, 43 L.Ed. 60.

⁶³ *Plumley v. Com. of Massachu-*

setts, 155 U.S. 461, 15 S.Ct. 154, 39 L.Ed. 223.

⁶⁴ *BALDWIN v. G. A. F. SEELIG*, 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032, 101 A.L.R. 55, *Black's Cas. Constitutional Law*, 2d, 286.

⁶⁵ *Savage v. Jones*, 225 U.S. 501, 32 S.Ct. 715, 56 L.Ed. 1182; *Mintz v. Baldwin*, 289 U.S. 346, 53 S.Ct. 611, 77 L.Ed. 1245.

The doctrine protects such sales only as long as the goods have not been so incorporated with the general mass of property within the state. Such incorporation occurs whenever the package is broken, the first sale is made, or any beneficial use is made of such import other than storing it or offering it for sale in the original package.⁶⁶ The doctrine led to studied attempts to use it as a means for circumventing state regulatory laws by adapting the form of the package in which goods were shipped to the requirements of retail trade. The courts refused to countenance these attempts, and limited the doctrine to cases in which the goods were shipped in packages of the kind used in bona fide interstate trade.⁶⁷ The "original package doctrine" relates solely to the sale of goods brought into a state, not to the delivery therein of goods in response to an order previously taken therein.⁶⁸

Local Sales other than "Original Package" Sales

There is much to support the view that the "original package doctrine" is "more artificial than sound,"⁶⁹ and that it is not "an ultimate principle" but an "illustration of a principle."⁷⁰ That ultimate principle is that a state may not so regulate the local sales of interstate or foreign imports as to impose on either of them an unreasonable burden. Such sales are purely local activities, and may be extensively regulated by the state in which they are made. Commission merchants may be required to procure a license, and to file a bond to protect consignors, even though they deal exclusively in goods consigned to them from points outside the state.⁷¹ A statute limiting the local sale and use of cosmetics to those that had been registered with a state official may validly apply to cosmetics produced in other states, at least where the conditions precedent to registration

⁶⁶ *Southern Pac. Co. v. Callexico*, D.C., 288 F. 634; *City of Galveston v. Mexican Pet. Corp.*, D.C., 15 F.2d 208.

⁶⁷ *Austin v. State of Tennessee*, 179 U.S. 343, 21 S.Ct. 132, 45 L.Ed. 224; *Cook v. Marshall County*, 196 U.S. 261, 25 S.Ct. 233, 49 L.Ed. 471.

⁶⁸ *Rearick v. Pennsylvania*, 203 U.S. 507, 27 S.Ct. 159, 51 L.Ed. 295.

⁶⁹ *WHITFIELD v. OHIO*, 297 U.

S. 431, 56 S.Ct. 532, 80 L.Ed. 778, *Black's Cas. Constitutional Law*, 2d, 293.

⁷⁰ *BALDWIN v. G. A. F. SEELIG*, 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032, 101 A.L.R. 55, *Black's Cas. Constitutional Law*, 2d, 286.

⁷¹ *Hartford Accident & Indemnity Co. v. People of State of Illinois ex rel. McLaughlin*, 298 U.S. 155, 56 S.Ct. 685, 80 L.Ed. 1099.

are reasonable.⁷² Their sale and use may be prohibited if found, upon due inquiry, to be harmful. The mere fact that goods have been produced outside of a state confers no immunity from reasonable state regulation of their sale or use. It is, however, a factor that is not wholly unimportant. A state regulation might be immune to constitutional objections as applied to locally produced articles. It might, however, be such as to impose an undue burden upon interstate commerce. It could have that effect only so far as it affected articles produced outside of the state and introduced into it by means of interstate or foreign commerce. The fact that it affects such articles is thus very relevant in connection with certain forms of state regulation. The case of *Baldwin v. G. A. F. Seelig, Inc.*⁷³ furnishes the clearest illustration of this principle. The state regulations therein involved were described in the preceding paragraph. Their invalidity as applied to original package sales of milk produced outside of the state was therein discussed. They were held equally invalid as applied to the local sale of such milk after the original package had been broken by bottling the milk. The reasons were substantially the same for both types of sales, viz., the fact that the regulations established "an economic barrier against competition with the products of another state or the labor of its residents." The same ultimate reason lies back of the decisions prohibiting every form of discrimination against articles because of their origin without the state. A state may not require a license fee from dealers in seeds if it exempts those dealing in seeds grown within it,⁷⁴ nor from peddlers of fruits if it exempts those selling locally produced fruit.⁷⁵ Nor may it subject to even reasonable regulations the sale of used cars if the regulations are limited to used cars imported from other states.⁷⁶ The commerce clause prohibits a state from enforcing regulations, whatever their subject-matter, whose aim or necessary result is the erection of the equivalent of a tariff barrier against the competition of other states or foreign countries. The question whether the "original package doctrine" has become superfluous for defining the limits imposed by the commerce clause upon the regulation of the local sale or use of articles

⁷² *BOURJOIS, INC. v. CHAPMAN*, 301 U.S. 183, 57 S.Ct. 691, 81 L.Ed. 1027, Black's Cas. Constitutional Law, 2d, 277.

⁷³ 294 U.S. 511, 55 S.Ct. 497, 79 L. Ed. 1032, 101 A.L.R. 55.

⁷⁴ *Boyce v. French*, D.C., 293 F. 43.

⁷⁵ *Gramling v. Maxwell*, D.C., 52 F.2d 256.

⁷⁶ *Asher v. Ingels*, D.C., 13 F.Supp. 654; *Park, McLain, Inc. v. Hoey*, D. C., 19 F.Supp. 990.

brought in from outside the state depends upon whether any regulations, invalid as applied to "original package sales," would not be invalid as applied to sales made after the goods have been incorporated in the general mass of a state's property. A definitive answer is not possible. It is, however, safe to say that the cases in which it and the principles discussed in this paragraph will give contradictory results are relatively few. The commerce clause is a free trade charter for interstate trade in the sense that it prohibits states to erect the equivalent of tariff barriers against such trade. How far, if at all, Congress can in effect establish such barriers is an undetermined matter.⁷⁷

ACTIONS IN STATE COURTS AS BURDENS UPON INTERSTATE COMMERCE

160. The commerce clause prohibits a state from permitting its courts to assume jurisdiction of actions where the assumption of such jurisdiction will unduly burden interstate commerce. The legitimate interests of plaintiffs are an important factor in determining whether the burden is undue.

The principle that the commerce clause invalidates state regulation of purely local matters if the regulation produces an undue burden upon interstate or foreign commerce is frequently invoked where the circumstances afford practically no basis therefor. It has been unsuccessfully urged against all manner of state legislation, including censorship of moving pictures⁷⁸ and "Blue-Sky Laws."⁷⁹ It would be futile to list even a fraction of such cases.⁸⁰ The principle has, however, had a most important application in limiting a state in subjecting individuals and corporations engaged in interstate commerce within

⁷⁷ Federal regulations may limit the states in regulating the sale within them of goods that have been introduced into them from other states even when such sales are not in the original package; *McDermott v. Wisconsin*, 228 U.S. 115, 33 S.Ct. 431, 57 L.Ed. 754, 47 L.R.A., N.S., 984, Ann.Cas.1915A, 39; *Weigle v. Cur-tice Bros. Co.*, 248 U.S. 235, 39 S.Ct. 124, 63 L.Ed. 242.

⁷⁸ *Mutual Film Corp. v. Industrial Commission of Ohio*, 236 U.S. 230, 35

S.Ct. 387, 59 L.Ed. 552, Ann.Cas. 1916C, 296.

⁷⁹ *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 37 S.Ct. 217, 61 L.Ed. 480, L.R.A.1917F, 514, Ann.Cas.1917C, 643.

⁸⁰ It would be interesting to compare the theory that such regulations affect interstate commerce indirectly only with the theory that such activities are sufficiently related to interstate commerce to warrant federal intervention to regulate them in some respects.

it to the jurisdiction of its courts, or in denying them access thereto. The former of these only will be discussed at this point.⁸¹ The doctrine was developed to deal with the evils of the so-called "imported suit." This was the practice of suing a railroad in a state in which its only activity was maintaining an agent for the solicitation of traffic over its lines wholly situated in other states, and of which the plaintiff had generally been a non-resident when the cause of action sued upon arose. Such actions were generally commenced either by attaching traffic balances due the defendant from railroads whose lines were situated in such state or by service upon its traffic solicitor therein. This practice was greatly aided by statutes permitting the commencement of actions in that manner. The first case in which a statute permitting suits to be commenced by service upon the soliciting agent of a foreign railroad corporation was held invalid was one in which the cause of action had arisen out of a purely intrastate transaction in another state and had no connection whatever with the state of the forum or the activities of the defendant's soliciting agent therein, the plaintiff was a non-resident of the latter state, and the defendant railroad neither owned nor operated any line of railroad within it. The statute was held in conflict with the commerce clause so far as it permitted the defendant to be sued in the state in question under those circumstances.⁸² The prohibited burden upon interstate commerce was found in the interference with the efficient operation of railroads engaged in such commerce resulting from the enforced absence of railroad employees for unreasonably long periods while attending the trial of such suits. The effect of this decision cannot be avoided by having the plaintiff acquire a residence in the state of the forum after the cause of action arose, at least not where the purpose thereof is to avoid the doctrine of that case.⁸³ It does not, however, prevent a suit by a plaintiff who was a resident of the state of the forum at the time the cause of action arose even though the defendant operated no part of its railroad within it.⁸⁴ The basis for the suit in the

⁸¹ The latter will be discussed in dealing with a state's power to regulate foreign corporations engaged in interstate commerce within it in connection with which it has generally arisen.

⁸² *Davis v. Farmers' Co-op. Equity Co.*, 262 U.S. 312, 43 S.Ct. 556, 67 L. Ed. 996.

⁸³ *Michigan Cent. R. Co. v. Mix*, 278 U.S. 492, 49 S.Ct. 207, 73 L.Ed. 470.

⁸⁴ *State of Missouri ex rel. St. Louis, B. & M. R. Co. v. Taylor*, 266 U.S. 200, 45 S.Ct. 47, 69 L.Ed. 247, 42 A.L.R. 1232.

case last cited was an injury to goods being carried in interstate commerce on a through bill for delivery within the state of the forum. If the defendant operates a line of railroad within the state of the forum, it may be sued therein even though the plaintiff was a non-resident when the cause of action arose, is such at the time the action is commenced, and the cause of action arose outside the state and had no connection with any transactions occurring within it. It is immaterial in such case whether the defendant be a domestic or foreign corporation.⁸⁵ The fact that the plaintiff is a resident of the state of the forum has been said to be not the only factor to be considered in fixing the proper forum, but to be nevertheless a very significant one in that connection. This factor, coupled with the fact that the defendant's vessels did at least at times operate within the state of the forum, justifies a suit in its courts on a tort cause of action arising in another state not connected with any transaction occurring in the state of the forum.⁸⁶ The suit in this case was begun by attachment of the defendant's vessel present in the state in the course of its navigation business. The Court left undecided the right of such state to apply that procedure in the case of property casually or occasionally present within the state. These cases show clearly that the burden upon interstate commerce which was the decisive factor in *Davis v. Farmers' Co-op. Equity Co.* is such only when there are present no countervailing considerations of fairness to the plaintiff in such suits, and that his residence in the state of the forum is generally a sufficient basis for requiring interstate commerce to bear such burden. A foreign corporation whose principal place of business is in the state of the forum is deemed a resident thereof for purposes of applying this principle. A factor other than such residence may have the same effect if it tends to show that permitting the suit is fair and just. The development of this doctrine shows the same balancing of the general interest in protecting interstate commerce from factual burdens and that of honest plaintiffs to sue in what is for them a natural and convenient forum that has marked judicial action in other situations involving interstate commerce.

⁸⁵ *Hoffman v. State of Missouri* ex rel. Foraker, 274 U.S. 21, 47 S.Ct. 485, 71 L.Ed. 905 (domestic corporation); *Boright v. Chicago, R. I. & P.*

R. Co., 180 Minn. 52, 230 N.W. 457 (foreign corporation).

⁸⁶ *International Milling Co. v. Columbia Transp. Co.*, 292 U.S. 511, 54 S.Ct. 797, 78 L.Ed. 1396.

STATE REGULATION OF FOREIGN CORPORATIONS

161. A foreign corporation may not be prohibited from engaging within a state in interstate commerce, but its conduct thereof is subject to reasonable regulation. Such regulation may not be of such character as to directly burden interstate commerce.

Regulation of Foreign Corporations Engaged in Interstate Commerce

A state may exclude foreign corporations from transacting purely intrastate business within it, and impose any but unconstitutional conditions upon its grant of that privilege to such corporations. It may in general require a corporation to become a domestic corporation before permitting it to transact a local business within it, and it does not lose that right merely because the foreign corporation is already engaged in interstate commerce therein.⁸⁷ It is not improbable that this indirect method of limiting the activities of foreign corporations engaged in interstate commerce within a state might be held invalid if it could be shown that compliance with the requirement imposed an undue burden upon their interstate commerce activities. The right to engage in the latter is not a privilege conferred by the states, but one derived from the Constitution. It is not lost by incorporation, and a state may not condition its exercise within it upon procuring its assent thereto.⁸⁸ A state has, however, an undeniable interest in the manner of its exercise, and has the same power to subject its exercise to reasonable regulation that it has to so regulate the transaction of interstate commerce within it by individuals. The limit on its power to do so is that such regulation shall not unduly burden interstate commerce. The principal problem has been to determine when a regulation produces that effect. Requirements frequently imposed have been the filing by the foreign corporation with some state official of a copy of its corporate charter and detailed statements concerning its business and corporate affairs, and the appointment of a resident agent to accept service of process in actions brought against it within the state. A state may not condition the right to engage in interstate commerce within it upon com-

⁸⁷ *Railway Express Agency v. Virginia*, 282 U.S. 440, 51 S.Ct. 201, 75 L.Ed. 450, 72 A.L.R. 102.

⁸⁸ *Crutcher v. Commonwealth of Kentucky*, 141 U.S. 47, 11 S.Ct. 851, 35 L.Ed. 649.

pliance with such requirements.⁸⁹ The vice in imposing such condition lies rather in the method adopted for enforcing compliance with requirements of the kind referred to above than in the character of the requirements themselves. A foreign corporation whose business within a state consists wholly of interstate commerce is carrying on business within it so as to be subject to suit therein, and a statute authorizing the commencement of actions against it by service upon an agent authorized to act for it in connection with such business violates neither the commerce clause nor the due process clause of the Fourteenth Amendment.⁹⁰ This decision clearly implies that a statute requiring such corporation to appoint an agent to accept service of process in actions brought against it within the state would be a valid requirement enforceable by methods not directly or indirectly involving a denial of its right to conduct interstate commerce. A statute of the kind involved in the case last cited, or of the type suggested in the last preceding sentence, is clearly valid as to causes of action arising out of the interstate business carried on within the state. Their validity is not so clear if applied to causes of action in no way related to such business.⁹¹ A statute of the former type is invalid for conflict with the commerce clause if applied to a cause of action arising out of business carried on within a state so far as it permits a suit thereon after the corporation has ceased to do business within the state and revoked the appointment of its agent.⁹² It would be equally invalid under those circumstances if applied to a cause of action not arising out of the business carried on within the state.

Denial to Foreign Corporations of Right to Sue in State Courts

A common method for compelling foreign corporations engaged within a state in interstate commerce only to comply with state regulations has been to deny them the right to sue in its courts on causes of action arising out of their business within the state. The cases have all involved suits on contracts made in the course of such business. The states have resorted to this

⁸⁹ *Crutcher v. Commonwealth of Kentucky*, 141 U.S. 47, 11 S.Ct. 851, 35 L.Ed. 649.

⁹⁰ *International Harvester Co. v. Commonwealth Kentucky*, 234 U.S. 579, 34 S.Ct. 944, 58 L.Ed. 1479.

⁹¹ That it would be invalid is an inference justified by certain of the language of the opinion in *Sioux Remedy Co. v. Cope*, 235 U.S. 197, 35 S.Ct. 57, 59 L.Ed. 193.

⁹² *Guerin Mills, Inc. v. Barrett*, 254 N.Y. 380, 173 N.E. 553.

method because of their patent inability to directly invalidate such contracts.⁹³ The right to enforce such contracts is so closely related to the right to engage in interstate commerce that its denial amounts to a practical denial of the latter. Such statutes have, accordingly, been invariably held to violate the commerce clause.⁹⁴ The right to sue on such contracts may be subjected to reasonable regulations that have a reasonable and natural relation to the right which they are intended to restrict. The regulations requiring a foreign corporation engaged in interstate commerce only to file its charter and financial statements, and to appoint an agent upon whom process may be served in any action against it, bear no such relation to the right to sue on contracts made in carrying on interstate commerce within the state. How far the commerce clause would permit a state to restrict such corporation's right to sue on causes of action not connected with its business within the state in order to compel compliance with such, or any other regulations, has not been determined. The decisions considered in this and the preceding paragraph show that the commerce clause does not permit a state to wholly deny foreign corporations the right to engage in interstate commerce within it nor to condition the exercise of that right upon its assent thereto, that it may subject its exercise to reasonable regulation, but that it may not enforce compliance with even reasonable regulations by methods directly burdening the exercise of that right or which render its exercise ineffective.

DISCRIMINATORY STATE REGULATION

162. A state regulation, whatever its subject matter, that discriminates against interstate or foreign commerce violates the commerce clause.

The commerce clause absolutely prohibits a state from discriminating against interstate commerce. The very fact that a state regulation does so suffices to prove that it imposes a direct burden upon interstate commerce. The cases in which this principle has been applied have been noted at appropriate points

⁹³ *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 42 S.Ct. 106, 66 L.Ed. 239.

⁹⁴ *International Textbook Co. v. Pigg*, 217 U.S. 91, 30 S.Ct. 481, 54

L.Ed. 678, 27 L.R.A.,N.S., 493, 18 Ann.Cas. 1103; *Sioux Remedy Co. v. Cope*, 235 U.S. 197, 35 S.Ct. 57, 59 L.Ed. 193; *Furst v. Brewster*, 282 U.S. 493, 51 S.Ct. 295, 75 L.Ed. 478.

in the previous discussion, and their further consideration is, accordingly, dispensed with.⁹⁵

THE TWENTY-FIRST AMENDMENT

163. The Twenty-first Amendment to the federal Constitution provides that the "transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The Eighteenth Amendment to the Constitution specifically prohibited the transportation of intoxicating liquors within, their importation into, and their exportation from, the United States and all territory subject to its jurisdiction, for beverage purposes. It was adopted in 1919 and repealed in 1933 by the adoption of the Twenty-first Amendment. The latter prohibits the transportation or importation of intoxicating liquors into any state, or territory or possession of the United States, for delivery or use therein in violation of the laws thereof. There have thus far been but few authoritative constructions of its provisions. Its terms might well be held to prohibit private persons from engaging in the proscribed activities. It is certain that Congress could enact legislation prohibiting private persons from engaging therein, and provide for its enforcement by imposing civil or criminal liability for its violation. It is equally certain that Congress could not authorize private persons to engage in any of the transactions prohibited by it. It is not so clear that it could not authorize the federal government itself to do so. The principal purpose of said prohibitions was undoubtedly to prevent the commerce clause from being used to protect interstate and foreign sales of intoxicants within the states as it had been used prior to the adoption of the Eighteenth Amendment. It has at least made the protection of the states against such interferences with their local policies in regard to intoxicants independent of Congressional legislation. It is a question what, if any, limits the commerce clause still imposes on their regulation of the transportation and importation of intoxicants into them. It has been stated by the Supreme Court that the Amendment confers upon a state the power to

⁹⁵ An excellent statement of this principle is found in the opinion in *South Carolina State Highway Dept.*

v. Barnwell Bros., 303 U.S. 177, 58 S.Ct. 510, 82 L.Ed. 734.

forbid all importations of intoxicants which do not comply with the conditions it prescribes.⁹⁶ There have been decisions in the lower federal courts that asserted the view that the Amendment did not deprive commerce in intoxicants of the protection of the commerce clause.⁹⁷ It does permit a state to impose a license fee upon their importation which would have been prohibited by the commerce clause prior to the adoption of the Amendment.⁹⁸ It was stated in the opinion in that case that the provisions of the Amendment would apply even though a state did not adopt the policy of complete prohibition, that it might establish a state monopoly and prohibit or discourage all competing importations, that it might limit importations to a single consignee, and that it might so limit them even if it did not establish a state monopoly.⁹⁹ The Supreme Court has not yet squarely faced the issue whether a state may prohibit or restrict importations for the purpose of reserving the local market for local producers or giving the latter a competitive advantage therein by discriminating against liquors produced outside the state. The language of the Amendment is sufficiently broad to justify an interpretation that the commerce clause no longer protects interstate and foreign commerce in intoxicants against such discriminatory state action.¹ The erection of state tariff walls against intoxicants produced in other states is a distinct possibility.² The equal protection clause of the Fourteenth Amendment has been invoked by some courts to prevent this result so far as legislation discriminating against intoxicants produced outside of the state has been relied upon to achieve it.³

⁹⁶ *State Board of Equalization of California v. Young's Market*, 299 U.S. 59, 57 S.Ct. 77, 81 L.Ed. 38. See also *Mahoney v. Joseph Triner Corporation*, 304 U.S. 401, 58 S.Ct. 952, 82 L.Ed. 1424.

⁹⁷ *General Sales & Liquor Co. v. Becker*, D.C., 14 F.Supp. 348; *Frank McCormick, Inc. v. Arundel*, D.C., 11 F.Supp. 145.

⁹⁸ *State Board of Equalization v. Young's Market*, 299 U.S. 59, 57 S.Ct. 77, 81 L.Ed. 38. See, also, *Dugan v. Bridges*, D.C., 16 F.Supp. 694.

⁹⁹ *State v. Andre*, 101 Mont. 366, 54 P.2d 566 (holding that the 21st Amendment, U.S.C.A.Const. permits

establishment of a state monopoly, and that doing so would not violate commerce clause).

¹ The fact that some of the state's regulations produced that effect held not violative of either the commerce or equal protection clauses; *Premier-Pabst Sales Corp. v. Grosscup*, D.C., 12 F.Supp. 970.

² See in this connection *State ex rel. Superior Distributing Co. v. Davis*, 132 Ohio St. 308, 7 N.E.2d 652; *Indianapolis Brewing Co. v. Liquor Control Commission of Michigan*, D.C., 21 F.Supp. 969, affirmed 305 U.S. —, 59 S.Ct. 254, 83 L.Ed. —.

³ *Frank McCormick, Inc. v. Arundel*, D.C., 11 F.Supp. 145.

The Supreme Court has thus far declined to accept the view that the Twenty-first Amendment has freed the states, in exercising their police power with respect to intoxicants, of all federal Constitutional restrictions thereon.⁴ It has, however, announced a theory that a classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth.⁵ That position contains little to encourage a belief that the equal protection clause will interpose any considerable obstacle to state legislation discriminating against intoxicants produced without the state.

THE "ORIGINAL PACKAGE" DOCTRINE AND STATE TAXATION

164. The commerce clause prohibits a state from so exercising its taxing powers as to impose a direct burden upon interstate and foreign commerce. The "original package" doctrine constitutes one of the tests employed for determining whether a given state tax produces the prohibited burden upon such commerce.

The commerce clause protects interstate and foreign commerce not only against exercises of a state's police power but also against exercises of its taxing power. The general principles employed in defining the extent of the protection accorded them by that clause is the same as that applied in protecting them against state police regulations. A state tax that imposes a direct burden upon them violates the commerce clause; one that burdens or affects them indirectly only is not prohibited thereby. These general principles do not, however, indicate how the existence or non-existence of the prohibited burden is to be determined. The tests can be derived only from a consideration of the decisions in which they have been applied. These contain but little explicit economic analysis aimed at measuring the effects of given taxes upon interstate and foreign trade and commerce. The courts have adopted tests that they could apply without involving themselves in the complexities of theories as to the shifting and incidence of taxes and their effects upon the distribution of capital and labor among different kinds of

⁴ State Board of Equalization v. Young's Market, 299 U.S. 59, 57 S.Ct. 77, 81 L.Ed. 38.

⁵ State Board of Equalization v. Young's Market, 299 U.S. 59, 57 S.Ct. 77, 81 L.Ed. 38.

businesses and industries. Their decisions have often embodied judgments as sound as those that might have been reached by complicated economic reasoning. The most convenient procedure for discovering the tests actually developed by the courts is to classify the cases on the basis of the type of tax involved in them. This method will in general be followed in the subsequent discussion.

The "original package doctrine" has already been discussed as a factor in defining the limits imposed on a state's police power by the commerce clause. It is also an important factor in defining the limits imposed thereby upon a state's taxing power. It was first enunciated in a case involving a state license tax upon those engaged in selling in their original package articles imported from foreign countries. The tax was held invalid for conflict with the commerce clause as an interference with the importation of articles whose importation Congress had authorized, and the imposition of which would defeat the purposes for which the power to regulate foreign commerce had been conferred upon Congress.⁶ The latter reason would be equally applicable to such imports even though they had not been subjected to a federal tax on their importation, and the doctrine has been extended to protect them as fully as it protects those that have paid such federal tax.⁷ The same principles would also invalidate specific sales taxes upon their sale in the original package. They may not be subjected to state property taxes while in such package.⁸ The principle protects them from the time of their importation until they have become incorporated with the general mass of property within the state. They are deemed to have been thus incorporated therewith when the package in which they were imported is broken for the purpose of making a beneficial use of them other than to merely change the form or size of that package. Thus imports imported in boxes containing separate packages become incorporated with the general mass of property within the state when the box is broken and the separate packages are permanently removed therefrom.⁹ Where, however, the covering of a bale of imported cotton was removed to facilitate compressing it for export purposes, the cotton was held not to have lost the

⁶ *Brown v. Maryland*, 12 Wheat. 419, 6 L.Ed. 678.

⁸ *Low v. Austin*, 13 Wall. 29, 20 L. Ed. 517.

⁷ *Southern Pac. Co. v. Callexico*, D.C., 288 F. 634.

⁹ *May & Co. v. New Orleans*, 178 U.S. 496, 20 S.Ct. 976, 44 L.Ed. 1165,

protection of this doctrine.¹⁰ Their pledge to secure a loan of their owner terminates their immunity.¹¹ Their first sale ends it, but merely storing them or offering them for sale in the original package does not do so.¹² The foregoing discussion has dealt only with imports from a foreign country. The immunity accorded interstate "imports" was never as broad as that accorded foreign imports. They have always been held liable to state property taxes while in their original package.¹³ Excise taxes on the business of selling them in the original package, and taxes on their sale in that form, were at one time held to violate the commerce clause,¹⁴ but subsequent decisions have reversed those holdings.¹⁵ The result is that the "original package doctrine" has ceased to be a factor in defining the limits imposed on a state's taxing power by the commerce clause so far as interstate "imports" are concerned.

TAXATION OF GOODS OR PERSONS MOVING IN INTERSTATE COMMERCE

165. A state may not tax either goods or persons moving in interstate or foreign commerce within it.

A state's taxing power is limited not only by the commerce clause but also by the due process clause of the Fourteenth Amendment. The validity of a given tax as applied to a particular case will frequently be questioned under both of those constitutional provisions. The present discussion will consider its validity under the former of them only. A state tax upon all freight moving within the state computed at a specified rate per ton violates the commerce clause as applied to interstate freight. It is a direct burden thereon since it is a tax on goods because they move therein. The liability for it accrues only when they so move.¹⁶ This case is merely one instance of the

¹⁰ Southern Pac. Co. v. Callexico, D.C., 288 F. 634.

¹¹ Southern Pac. Co. v. Callexico, D.C., 288 F. 634.

¹² City of Galveston v. Mexican Petroleum Corp., D.C., 15 F.2d 208.

¹³ Woodruff v. Parham, 8 Wall. 123, 15 L.Ed. 382.

¹⁴ Askren v. Continental Oil Co.,

252 U.S. 444, 40 S.Ct. 355, 64 L.Ed. 654; Bowman v. Continental Oil Co.,

256 U.S. 642, 41 S.Ct. 606, 65 L.Ed. 1139.

¹⁵ Texas Co. v. Brown, 258 U.S. 466, 42 S.Ct. 375, 66 L.Ed. 721; Sonneborn Bros. v. Cureton, 262 U.S. 506, 43 S.Ct. 643, 67 L.Ed. 1095.

¹⁶ Philadelphia & Reading R. Co. v. Pennsylvania, 15 Wall. 232, 21 L.

principle that the commerce clause prohibits a state to tax goods that are moving within it in interstate or foreign commerce. Most of the cases so holding have involved the levy upon such goods of a state's regular general property tax computed on the basis of their value. The levy of such tax has invariably been held to violate the commerce clause.¹⁷ The matter principally discussed in the cases has been whether the goods were moving in such commerce at the time that the tax was levied. The issues have been of three general types as follows: (1) when are such goods deemed to have entered the channels of such commerce; (2) when is their transportation therein deemed to have ended; and (3) does an interruption of their movement terminate their interstate or foreign transportation. The goods are deemed to have entered interstate commerce as soon that they have begun their final movement to a point outside the state. The mere intention of an owner to ultimately ship them in interstate commerce, or the fact that in the usual course of business they will be shipped therein, will not put them into such commerce, nor does a preparatory assembling of the goods with a view to an interstate movement have that effect.¹⁸ Delivery to a carrier for interstate shipment is sufficient therefor. Logs being floated down an intrastate stream for delivery at its mouth to ships that were to transport them outside the state have been held to be moving in interstate commerce while being floated down that stream,¹⁹ but would not be deemed moving therein while being held in the river prior to the commencement of their journey.²⁰ A movement from one point in a state to another point therein is deemed interstate commerce if any part of the journey is through an-

Ed. 146. See, also, *Eureka Pipe Line Co. v. Hallanan*, 257 U.S. 265, 42 S. Ct. 101, 66 L.Ed. 227 (tax on transportation of oil by pipe line computed at specified amount per barrel transported held invalid).

¹⁷ *COE v. ERROL*, 116 U.S. 517, 6 S.Ct. 475, 29 L.Ed. 715, *Black's Cas. Constitutional Law*, 2d, 296; *Kelley v. Rhoads*, 188 U.S. 1, 23 S.Ct. 259, 47 L.Ed. 359; *Champlain Realty Co. v. Brattleboro*, 260 U.S. 366, 43 S.Ct. 146, 67 L.Ed. 309, 25 A.L.R. 1195; *Hughes Bros. Timber Co. v. State of Minnesota*, 272 U.S. 469, 47 S.Ct. 170, 71 L.Ed. 359; *Carson Petroleum Co.*

v. Vial, 279 U.S. 95, 49 S.Ct. 292, 73 L.Ed. 626.

¹⁸ *COE v. ERROL*, 116 U.S. 517, 6 S.Ct. 475, 29 L.Ed. 715, *Black's Cas. Constitutional Law*, 2d, 296; *Hughes Bros. Timber Co. v. State of Minnesota*, 272 U.S. 469, 47 S.Ct. 170, 71 L.Ed. 359.

¹⁹ *Hughes Bros. Timber Co. v. State of Minnesota*, 272 U.S. 469, 47 S.Ct. 170, 71 L.Ed. 359.

²⁰ *COE v. ERROL*, 116 U.S. 517, 6 S.Ct. 475, 29 L.Ed. 715, *Black's Cas. Constitutional Law*, 2d, 296.

other state. No case has been found in which the question of the power of the state of either the origin or destination of the goods to tax them while moving within it in the course of such an interstate journey has been decided. The commerce clause would invalidate their taxation by the intermediate state.²¹

The protection of the commerce clause is not lost until the interstate movement has ended. It is deemed to have ended when the goods have come to rest within a state and are being held there at the pleasure of their owner for disposal or use within or without such state as he may determine.²² It is immaterial in such case that they are still contained in the vehicle in which they were transported if he is in substance using that as a place for their storage.²³ The fact that he contemplates their subsequent further interstate shipment, or that such shipment occurs in the usual course of business, does not prevent them from being deemed to have come to rest within the state and to have become incorporated with the general mass of property therein.²⁴ The effect of an interruption upon the continuity of an interstate movement depends upon its causes and purposes. If it is due to the necessities of the journey or for the purposes of its safety or convenience, the goods are deemed to continue in interstate commerce entitled to the immunity conferred upon them by the commerce clause.²⁵ If its purpose is to enable their owner to deal with them in a manner not intended to facilitate the particular interstate journey that was interrupted, or in a manner not directly connected with or incidental to that movement, the interruption removes them from the channels of interstate commerce and subjects them to the taxing power of the state.²⁶ The principles employed in

²¹ COE v. ERROL, 116 U.S. 517, 6 S.Ct. 475, 29 L.Ed. 715, Black's Cas. Constitutional Law, 2d, 296.

²² Minnesota v. Blasius, 290 U.S. 1, 54 S.Ct. 34, 78 L.Ed. 131.

²³ Brown v. Houston, 114 U.S. 622, 5 S.Ct. 1091, 29 L.Ed. 257; Pittsburg & S. Coal Co. v. Bates, 156 U.S. 577, 15 S.Ct. 415, 39 L.Ed. 538.

²⁴ Heisler v. Thomas Colliery Co., 260 U.S. 245, 43 S.Ct. 83, 67 L.Ed. 237; Oliver Iron Mining Co. v. Lord,

262 U.S. 172, 43 S.Ct. 526, 67 L.Ed. 929.

²⁵ COE v. ERROL, 116 U.S. 517, 6 S.Ct. 475, 29 L.Ed. 715, Black's Cas. Constitutional Law, 2d, 296; Minnesota v. Blasius, 290 U.S. 1, 54 S.Ct. 34, 78 L.Ed. 131.

²⁶ Diamond Match Co. v. Ontonagon, 188 U.S. 82, 97, 23 S.Ct. 266, 272, 47 L.Ed. 394, 400; Bacon v. People of State of Illinois, 227 U.S. 504, 33 S.Ct. 299, 57 L.Ed. 615; Susquehanna Coal Co. v. South Amboy, 228 U.S. 665, 33 S.Ct. 712, 57 L.Ed. 1015.

determining these matters are wholly different from those invoked when the question is one of the extent of the federal commerce power.²⁷ The cases cited in this paragraph did not all involve state property taxes, but the tests of whether goods are moving in interstate or foreign commerce do not depend upon the character of the tax. The commerce clause also prohibits a state from taxing the interstate or foreign transportation of persons.²⁸ It will not be permitted to evade this restriction by giving the exaction the form of an inspection fee,²⁹ nor by making the payment of the tax the alternative to a regulation which the state has no power to enforce.³⁰ The net result of the decisions considered herein is to relieve interstate and foreign transportation of goods and persons from the burdensome exactions resulting from state taxation of such transportation or of the goods or persons while in transit.

TAXATION OF PROPERTY USED IN INTERSTATE COMMERCE

166. A state may tax property located within it, or regularly used within it, even though its principal or sole use therein is in connection with interstate or foreign commerce. It may value it by taking into account the fact that it is an integral part of a unit of property within and without it employed in such commerce within and without it. It may not employ such a method for determining the amount thereof taxable by it as will in effect involve the taxation of property located outside of its borders.
167. A state may compute its tax on the property employed within it in interstate commerce either on the ad valorem basis, on the basis of the gross earnings derived from its use in both intrastate and interstate commerce, or on any other basis that fairly measures its value.

Taxation of Cars Used in Interstate Commerce

The commerce clause does not prohibit a state from taxing property merely because it is being used within it in interstate or

²⁷ See *Minnesota v. Blasius*, 290 U. S. 1, 54 S.Ct. 34, 78 L.Ed. 131.

²⁸ *Passenger Cases*, 7 How. 283, 12 L.Ed. 702; *Crandall v. Nevada*, 6 Wall. 35, 18 L.Ed. 745 (the principal basis for this decision was not the commerce clause).

²⁹ *New York v. Compagnie Generale Transatlantique*, 107 U.S. 59, 60, 2 S.Ct. 87, 27 L.Ed. 383.

³⁰ *Henderson v. Wickham*, 92 U.S. 259, 23 L.Ed. 543.

foreign commerce. Such property may be made to contribute its fair share to the support of a state's government.³¹ The property that may be thus taxed includes the equipment and vehicles used for transporting goods or persons in interstate or foreign commerce; these are not deemed to be goods moving therein.³² Tangible property employed in such commerce may either have its permanent physical location within the state or be only intermittently present therein. Taxation of the former conflicts with the commerce clause only if its amount is so measured as to produce what is in effect a taxation of property beyond the borders of the taxing state. A state property tax on moveable property employed in interstate commerce has been held to violate the commerce clause where the property had not acquired a situs within it.³³ The tax in this case was imposed by a state other than that of the owner's domicile. The taxation of such moveables by a non-domiciliary state is consistent with the commerce clause if they are permanently employed therein even though it be in interstate commerce.³⁴ The domiciliary state has been permitted to tax all such property owned by a domestic corporation which had failed to show that any part of it had been continuously employed without the state during the tax year.³⁵ A non-domiciliary state may tax cars and other equipment used within it in interstate commerce even though no specific cars or other units of equipment are continuously so employed therein.³⁶ The commerce clause in effect permits the taxation of the capital so employed and represented by such cars and equipment, but requires such state to determine its amount in such manner as will not result in taxing property beyond its borders.³⁷ There is no requirement that it follow any particular rule for arriving at that amount. The use of a factor that reflects the extent to which such property

³¹ *Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194, 17 S.Ct. 305, 41 L.Ed. 683; *Cudahy Packing Co. v. Minnesota*, 246 U.S. 450, 38 S.Ct. 373, 62 L.Ed. 827.

³² *Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18, 11 S.Ct. 876, 35 L.Ed. 613.

³³ *Morgan v. Parham*, 16 Wall. 471, 21 L.Ed. 303.

³⁴ *Old Dominion S. S. Co. v. Virginia*, 198 U.S. 299, 25 S.Ct. 686, 49

L.Ed. 1059, 3 Ann.Cas. 1100. The tax herein was not even objected to on the basis of the commerce clause.

³⁵ *New York ex rel. New York C. & H. R. R. Co. v. Miller*, 202 U.S. 584, 26 S.Ct. 714, 50 L.Ed. 1155.

³⁶ *Union Refrigerator Transit Co. v. Lynch*, 177 U.S. 149, 20 S.Ct. 631, 44 L.Ed. 708.

³⁷ *American Refrigerator Transit Co. v. Hall*, 174 U.S. 70, 19 S.Ct. 599, 43 L.Ed. 899.

is actually employed within a state is certain to be sustained. The "average daily car" method is, perhaps, that best adapted to prevent an unconstitutional result.³⁸ The use of the "unit system" by which a portion of the owner's total investment in such cars and equipment is allocated to the taxing state is valid if the total investment is properly computed and a proper basis of allocation is employed.³⁹ It violates the commerce clause if either of those conditions is not met.⁴⁰ The ultimate test of whether the method employed in effect taxes any of such property which is beyond a state's borders is whether it produces an unreasonably excessive valuation of that which is used within a non-domiciliary state. A domiciliary state is not as narrowly limited as is a non-domiciliary state in this matter, but the cases permit no precise statement as to the limits on its power

The "Unit Rule"

A state does not violate the commerce clause by taxing the property permanently employed within it in interstate commerce. It may tax not only the tangible property so employed but also any intangibles so employed such as special franchises.⁴¹ It may also tax such intangible value as results from the employment of such property in a going business. This latter element is variously described as going concern value, goodwill, and corporate excess. Its ultimate economic basis is the fact that the capitalized value of the net income from the business in which such other property is employed exceeds the value of the latter measured by the usual standards used in its valuation. The reason for its existence is usually that the business

³⁸ American Ref. Transit Co. v. Hall, 174 U.S. 70, 19 S.Ct. 599, 43 L. Ed. 899. See Union Tank Line Co. v. Wright, 249 U.S. 275, 39 S.Ct. 276, 63 L.Ed. 602 (involving jurisdictional issue under the due process clause of the Fourteenth Amendment, U.S. C.A.Const.).

³⁹ Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 11 S.Ct. 876, 35 L.Ed. 613 (allocation in this case was on the basis of miles of road over which the taxpayer operated its cars; see discussion of this case in Union Tank Line Co. v.

Wright, 249 U.S. 275, 39 S.Ct. 276, 63 L.Ed. 602).

⁴⁰ See Union Tank Line Co. v. Wright, 249 U.S. 275, 39 S.Ct. 276, 63 L.Ed. 602. The reasoning of this case, in which no issue was raised under the commerce clause, would apply had that issue been raised.

⁴¹ Henderson Bridge Co. v. Commonwealth of Kentucky, 166 U.S. 150, 17 S.Ct. 532, 41 L.Ed. 953; Schwab v. Richardson, 263 U.S. 88, 44 S.Ct. 60, 68 L.Ed. 183.

possesses a degree of monopoly which may be due to a wide variety of causes. A state is not required, by either the due process clause of the Fourteenth Amendment or the commerce clause, to ignore this element of value.⁴² Both those provisions, however, limit the non-domiciliary state in determining the total value of property used in interstate commerce within it, and prohibit it from so measuring it as in effect to tax property outside of its borders. The problem arises only where the property within the state is an integral part of a larger unit of property employed within and without the state in conducting a unitary business of which that conducted within the state is an integral part. The difficulties of an adequate valuation of the property used within the state without a consideration of its relation to that employed elsewhere led to the adoption of the so-called "unit rule" for valuing that within it. Its essential elements are a valuation of the property employed in the given business both within and without the state, and the allocation of a part thereof to the taxing state. The commerce clause permits a state to value the property used in interstate commerce within it by resort to this method if it uses a properly determined "unit property" and a proper allocation formula for assigning to it a part of the value of such unit.⁴³ It may include in the "unit property" only such property outside it as is there used in conducting the business in connection with which the property within it is employed. The test of inclusion in the "unit property" is unity of use and not mere unity of ownership. If the owner is engaged without the state in both the business conducted within it and in a wholly separate business, the taxing state may not include in the "unit property" that employed outside it in the latter business, and the value of the "unit property" must reflect that factor.⁴⁴ There is no particular requirement as to how the value of a properly determined "unit property" must be ascertained. Methods frequently employed include capitalizing the net income from the business at an assumed percentage rate, taking the market value of the capital securities issued against the property and business, balance sheet values, and combinations of these methods.⁴⁵ The

⁴² *Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194, 17 S.Ct. 305, 41 L.Ed. 683; *Adams Express Co. v. Kentucky*, 166 U.S. 171, 17 S.Ct. 527, 41 L.Ed. 960.

⁴⁴ *Fargo v. Hart*, 193 U.S. 490, 24 S.Ct. 498, 48 L.Ed. 761.

⁴³ *Adams Express Co. v. Ohio*

⁴⁵ For a discussion of these see

type of adjustment necessary if the taxpayer is engaged in several businesses, only one of which is conducted within the taxing state, depends upon the methods employed in arriving at the value of the combined properties.

The second condition to the validity of this method under the commerce clause is the use of a proper method for assigning to the taxing state its fair share of the value of the "unit property." The commerce clause gives a state a wide latitude in this matter. A formula valid as applied to one case may be invalid as applied to another. Thus an allocation on the basis of the number of miles of railroad within the state to the total number thereof within and without the state was held proper where there were no special circumstances to distinguish between the conditions within and without the state,⁴⁶ but invalid where expensive terminals were located outside the taxing state in which there were no comparable facilities.⁴⁷ The character of the formula must necessarily be adapted to the kind of business, and one adapted for a railroad would scarcely serve for an express company.⁴⁸ The ultimate test of validity is whether the formula distributes the value between the taxing state and the others in which the "unit property" is located with a fair approximation to that required by sound economic considerations affecting the distribution of the "unit property's" value among its several parts. The "unit rule" has been generally used by the non-domiciliary state. There is no legal reason why it could not be used by a domiciliary state. However, the latter is permitted, so far as the due process clause of the Fourteenth Amendment is concerned, to tax the whole goodwill value. The commerce clause would undoubtedly be held to give it the same power to tax that value. It would thus lose by the use of this method.⁴⁹

footnotes to opinion in *Great Northern Ry. Co. v. Weeks*, 297 U.S. 135, 56 S.Ct. 426, 80 L.Ed. 532, a case which did not, however, involve an issue under the commerce clause.

⁴⁶ *Cleveland, C., C. & St. L. R. Co. v. Backus*, 154 U.S. 439, 14 S.Ct. 1122, 38 L.Ed. 1041.

⁴⁷ *Wallace v. Hines*, 253 U.S. 66, 40 S.Ct. 435, 64 L.Ed. 782.

⁴⁸ For other methods see *Adams*

Express Co. v. Ohio State Auditor, 165 U.S. 194, 17 S.Ct. 305, 41 L.Ed. 683; *Western Union Tel. Co. v. Att'y General of Massachusetts*, 125 U.S. 530, 8 S.Ct. 961, 31 L.Ed. 790.

⁴⁹ It should be noted that the reasoning employed in holding taxes invalid for violating the jurisdictional limitations on a state's power under the due process clause of the Fourteenth Amendment, U.S.C.A.Const. and that employed in holding them invalid for violating the commerce

"Lieu" Taxes

Taxes on property are usually levied on an ad valorem basis. The federal Constitution contains no requirement that they be so levied, and they have at times been imposed on the basis of the gross earnings from the use of the property in business. The inclusion of the gross earnings from its use in interstate commerce within the state has been held not to violate the commerce clause if the tax is actually in lieu of all other property taxes thereon.⁵⁰ The basis of the claim that their inclusion would be invalid was the well established rule that a state may not tax the gross earnings from interstate commerce. The answer thereto was that the gross earnings are not the subject of the tax in such case, but an index or measure of the value of the property producing them. A tax on gross receipts, including those from interstate commerce, is thus invalid if it is in addition to regular property taxes on the property from which derived since they would not in such case be used as a mere measure of its value.⁵¹ It has been intimated that such a property tax in lieu of all other property taxes might be invalid if in excess of what would be legitimate as an ordinary tax on the property, but no such tax has in fact ever been held invalid on that theory.⁵² It is difficult to see how it could, as a practical matter, be held invalid on that basis in view of the recognized power of states to classify property for purposes of taxation. The validity of such a tax if it is in lieu of part only of the regular property tax cannot be said to have been finally determined. The view that it is valid has some support. That support is found in an interpretation of the decision in *Maine v. Grand Trunk R. Co.* which sustained an excise tax on the privilege of exercising the taxpayer's local franchise into the measurement of which the gross receipts from interstate commerce entered as a factor.⁵³ The Supreme Court later construed this tax as in substance an attempt to reach the value of the railroad's prop-

clause, U.S.C.A.Const. Art. 1, § 8, cl. 3, is frequently the same.

⁵⁰ *United States Express Co. v. State of Minnesota*, 223 U.S. 335, 32 S.Ct. 211, 56 L.Ed. 459; *Cudahy Packing Co. v. Minnesota*, 246 U.S. 450, 38 S.Ct. 373, 62 L.Ed. 827; *Pullman Co. v. Richardson*, 261 U.S. 330, 43 S.Ct. 366, 67 L.Ed. 682.

⁵¹ *Galveston, H. & S. A. Ry. Co. v. Texas*, 210 U.S. 217, 28 S.Ct. 638, 52

L.Ed. 1031; *Meyer v. Wells Fargo & Co.*, 223 U.S. 298, 32 S.Ct. 218, 56 L.Ed. 445. See, however, discussion in Sections 163-169.

⁵² *United States Express Co. v. Minnesota*, 223 U.S. 335, 32 S.Ct. 211, 56 L.Ed. 459.

⁵³ *State of Maine v. Grand Trunk R. Co.*, 142 U.S. 217, 12 S.Ct. 121, 163, 35 L.Ed. 994.

erty as a going concern which had not been reached by the system of local property taxes to which it was also subjected.⁵⁴ The contrary view has the support of a more recent decision which held invalid a "franchise tax" based on gross receipts from both intrastate and interstate commerce despite the claim of the state that it was a property tax on the franchise as an element in the total property used within the state.⁵⁵ The case, however, lacks that decisive quality that would justify the view that it had definitively settled the problem. The gross earnings from interstate commerce included in computing these lieu taxes were limited to those earned within the taxing state, and this is secured by allocating the earnings from interstate traffic to the state on a mileage prorated basis. The right to impose lieu taxes is not restricted to those based on gross earnings. If the tax, whatever its designation, is in fact in lieu of all property taxes on the property used within the state in interstate commerce, it is valid.⁵⁶

TAXATION OF GROSS RECEIPTS AND NET INCOME

168. A direct state tax on the gross receipts of interstate or foreign commerce, or on the occupation of engaging therein measured thereby, violates the commerce clause. Their use as a measure of a property tax or of the value of a locally exercised privilege granted by the state is valid.
169. The commerce clause does not prohibit a state from taxing the net income derived within it from interstate and foreign commerce.

A state's direct taxation of the gross earnings or receipts from interstate or foreign commerce violates the commerce clause as a direct tax upon such commerce.⁵⁷ This principle applies not

⁵⁴ *Galveston, H. & S. A. Ry. Co. v. State of Texas*, 210 U.S. 217, 28 S.Ct. 638, 52 L.Ed. 1031. See further comments on the case of *State of Maine v. Grand Trunk R. Co.* in *Meyer v. Wells Fargo & Co.*, 223 U.S. 298, 32 S.Ct. 218, 56 L.Ed. 445, in *United States Express Co. v. State of Minnesota*, 223 U.S. 335, 32 S.Ct. 211, 56 L.Ed. 459, and in *WESTERN LIVE STOCK v. BUREAU OF REVENUE*, 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823, 115 A.L.R. 944, *Black's Cas. Constitutional Law*, 2d, 301.

⁵⁵ *New Jersey Bell Tel. Co. v. State Board of Taxes and Assessment of New Jersey*, 280 U.S. 338, 50 S.Ct. 111, 74 L.Ed. 463.

⁵⁶ *Postal Telegraph-Cable Co. v. Adams*, 155 U.S. 688, 15 S.Ct. 268, 360, 39 L.Ed. 311 (the tax in this case was in form a license tax on conducting both interstate and local commerce).

⁵⁷ *Philadelphia & Southern Mail S. S. Co. v. Pennsylvania*, 122 U.S.

only to interstate and foreign transportation but also to any of the other activities constituting such commerce.⁵⁸ A tax on an activity or occupation that constitutes interstate or foreign commerce which is measured by the gross receipts therefrom is invalid although in such case the gross receipts are nominally the measure of the tax.⁵⁹ If, however, the tax is levied for the privilege of engaging in business generally within the state, a tax measured by commissions earned is valid though the entire business during the given year consisted of interstate commerce.⁶⁰ It is often a question whether the activities whose gross receipts are taxed or used as a measure of the tax for engaging therein constitute intrastate or interstate commerce, but, if held to be the latter, a tax on, or measured by, the gross receipts therefrom, is invalid. The gross receipts from interstate transportation,⁶¹ from loading and unloading vessels engaged in interstate and foreign commerce,⁶² from interstate and foreign trade,⁶³ and radio broadcasting⁶⁴ have been held to be from interstate or foreign commerce, as the case may be. A tax on the gross receipts from tolls paid by one railroad to another for the use of the latter's tracks lying wholly within a state is not a tax on the gross receipts from interstate commerce even though the former used such tracks for its interstate trains.⁶⁵ The prohibition against the taxation by a state of the gross receipts from interstate or foreign commerce applies to both residents and non-residents of the taxing state, and to both domestic and foreign corporations. It was formerly stated that the vice of such taxes was that they laid a tax directly upon the activities producing the earnings and

326, 7 S.Ct. 1118, 30 L.Ed. 1200. Cf. *State Tax on Railway Gross Receipts*, 15 Wall. 284, 21 L.Ed. 164, overruled by first cited case.

⁵⁸ *Crew Levick Co. v. Pennsylvania*, 245 U.S. 292, 38 S.Ct. 126, 62 L.Ed. 295. See, also, *J. D. Adams Mfg. Co. v. Storen*, 304 U.S. 307, 58 S.Ct. 913, 82 L.Ed. 1365 (state general gross income tax).

⁵⁹ *Fisher's Blend Station, Inc. v. State Tax Commission*, 297 U.S. 650, 56 S.Ct. 608, 80 L.Ed. 956.

⁶⁰ *Ficklen v. Shelby County Taxing Dist.*, 145 U.S. 1, 12 S.Ct. 810, 36 L.Ed. 601.

⁶¹ *Galveston, H. & S. A. R. Co. v. Texas*, 210 U.S. 217, 28 S.Ct. 638, 52 L.Ed. 1031.

⁶² *Puget Sound Stevedoring Co. v. State Tax Commission of State of Wash.*, 302 U.S. 90, 58 S.Ct. 72, 82 L.Ed. 68.

⁶³ *Crew Levick Co. v. Pennsylvania*, 245 U.S. 292, 38 S.Ct. 126, 62 L.Ed. 295.

⁶⁴ *Fisher's Blend Station, Inc. v. State Tax Commission*, 297 U.S. 650, 56 S.Ct. 608, 80 L.Ed. 956.

⁶⁵ *New York L. E. & W. R. Co. v. Commonwealth of Pennsylvania*, 158 U.S. 431, 15 S.Ct. 896, 39 L.Ed. 1043.

one that varied directly with their extent. A more recent theory finds their invalidity in the fact that they place upon interstate commerce burdens "of such a nature as to be capable in point of substance, of being imposed, or added to, with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce."⁶⁶ This theory may well result in casting doubts upon many of the decisions based on the earlier theory. The commerce clause does not forbid a state to tax the gross receipts from intrastate commerce.⁶⁷ It has been intimated that this would be invalid if shown in fact to burden interstate commerce. This is not shown merely by proof that the withdrawal of a taxpayer from such commerce would increase its total losses beyond those incurred in conducting both intrastate and interstate commerce.⁶⁸ Nor is it shown by proof that the receipts from intrastate commerce are enhanced by the taxpayer's interstate business.⁶⁹ The use of the gross receipts from interstate commerce as a measure of the value of property or of a locally exercised privilege was considered in the preceding section.⁷⁰

A state may tax the net income derived from the transaction of interstate or foreign commerce within it.⁷¹ It is immaterial

⁶⁶ *WESTERN LIVE STOCK v. BUREAU OF REVENUE*, 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823, 115 A.L.R. 944, *Black's Cas. Constitutional Law*, 2d, 301.

⁶⁷ *Ratterman v. Western Union Tel. Co.*, 127 U.S. 411, 8 S.Ct. 1127, 32 L.Ed. 229; *Ohio River & W. R. Co. v. Dittey*, 232 U.S. 576, 34 S.Ct. 372, 58 L.Ed. 737. The gross receipts from traffic between two points within a state over a route passing through another state may be taxed if prorated on a mileage basis; *Lehigh Valley R. Co. v. Com. of Pennsylvania*, 145 U.S. 192, 12 S.Ct. 806, 36 L.Ed. 672; see, also, *People of State of New York ex rel. Cornell Steamboat Co. v. Sohmer*, 235 U.S. 549, 35 S.Ct. 162, 59 L.Ed. 355.

⁶⁸ *Pacific Telephone & Telegraph Co. v. State Tax Commission of State*

of Washington, 297 U.S. 403, 56 S.Ct. 522, 80 L.Ed. 760, 105 A.L.R. 1.

⁶⁹ *WESTERN LIVE STOCK v. BUREAU OF REVENUE*, 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823, 115 A.L.R. 944, *Black's Cas. Constitutional Law*, 2d, 301.

⁷⁰ For discussion of problems arising under a state gross income tax, see *Storen v. J. D. Adams Mfg. Co.*, 212 Ind. 343, 7 N.E.2d 941 (sustaining tax on gross income from interstate commerce as an excise on the privilege of domicile, transacting business, and receiving income within the state).

⁷¹ *United States Glue Co. v. Town of Oak Creek*, 247 U.S. 321, 38 S.Ct. 499, 62 L.Ed. 1135, *Ann.Cas.*1918E, 748; *Shaffer v. Carter*, 252 U.S. 37, 40 S.Ct. 221, 64 L.Ed. 445; *Underwood Typewriter Co. v. Chamberlain*,

whether that commerce consist of interstate or foreign transportation or of other forms of interstate or foreign commercial intercourse. The principle on which these decisions have been based is that the difference in effect between a tax on, or measured by, gross receipts and one on, or measured by, net income affords "a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental."⁷² The fact that a tax on gross receipts ignores the profitableness of the activity taxed, while one based on net income does not, was correctly held to make the former a greater deterrent than the latter. The tax on net income was in effect held a reasonable method for requiring interstate commerce to bear its fair share of the cost of government. If the net income is derived from business conducted both within and without the state a part only may be taxed, but the commerce clause requires only that the principles of allocation employed be not arbitrary.⁷³ The problems in such cases are generally similar to those that arise when the "unit rule" is employed in connection with any other type of tax. It is used in connection with income taxes except where income can be directly allocated to the taxing state.

LICENSE AND FRANCHISE TAXES

170. A state may not impose license or privilege taxes upon the conduct of interstate or foreign commerce within it. Neither may it impose franchise taxes upon foreign corporations engaged within it in such commerce only.
171. A state may impose license or privilege taxes upon the conduct of intrastate commerce within it, and franchise taxes upon foreign corporations engaged in such commerce therein. It is, however, prohibited by the commerce clause from exercising this power in such manner as to impose a direct burden upon interstate or foreign commerce.

License Taxes on Interstate or Foreign Transportation

The principle that the commerce clause prohibits a state from taxing the privilege of engaging in interstate or foreign commerce

254 U.S. 113, 41 S.Ct. 45, 65 L.Ed. 499, 62 L.Ed. 1135, Ann.Cas.1918E, 185; *Atlantic Coast Line R. Co. v. Doughton*, 262 U.S. 413, 43 S.Ct. 620, 67 L.Ed. 1051.

⁷³ *Bass, Ratcliff & Gretton v. State Tax Commission*, 266 U.S. 271, 45 S.Ct. 82, 69 L.Ed. 282.

⁷² *United States Glue Co. v. Town of Oak Creek*, 247 U.S. 321, 38 S.Ct.

within it has had innumerable applications. The privilege is one not derived from the state, and a state tax upon its exercise imposes a direct burden upon such commerce. The commonest forms of such taxes have included license taxes on occupations, excise taxes upon specific acts or transactions, and franchise taxes imposed on corporations. A state license tax levied on an occupation or business that consists entirely of interstate or foreign commerce is invalid.⁷⁴ The issue most frequently discussed in the cases is whether the particular occupation or business is or is not interstate or foreign commerce. The business of interstate or foreign transportation clearly may not be subjected to such taxes.⁷⁵ A business consisting wholly in the performance of services that are an indispensable part thereof is equally immune to such taxation. This is the basis for holding invalid license taxes upon those engaged in towing ships engaged in interstate commerce,⁷⁶ and upon those performing the services of loading and discharging cargoes that are to be moved, or have moved, in interstate or foreign commerce.⁷⁷ A person, however, who merely supplies shipowners with longshoremen who load and discharge such cargoes under the direction of the owners of the vessels may validly be required to pay a license tax for engaging therein.⁷⁸ The maintenance by a railroad company of an office for the solicitation of interstate traffic, and the activities of its agent in soliciting such traffic, are themselves interstate commerce immune to state license taxes.⁷⁹ An independent agency acting as the representative of persons engaged within a state in interstate

⁷⁴ *Leloup v. Port of Mobile*, 127 U. S. 640, 8 S.Ct. 1380, 1383, 32 L.Ed. 311.

⁷⁵ *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 5 S.Ct. 826, 29 L.Ed. 158.

⁷⁶ *Moran v. New Orleans*, 112 U.S. 69, 5 S.Ct. 38, 28 L.Ed. 653; *Harmon v. Chicago*, 147 U.S. 396, 13 S.Ct. 306, 37 L.Ed. 216. See, however, *Wiggins Ferry Co. v. City of East St. Louis*, 107 U.S. 365, 2 S.Ct. 257, 27 L.Ed. 419 (sustaining a license tax imposed upon the operation of an interstate ferry).

⁷⁷ *Puget Sound Stevedoring Co. v. State Tax Commission of State of*

Wash., 302 U.S. 90, 58 S.Ct. 72, 82 L.Ed. 68. See, also, *Rosenberger v. Pacific Express Co.*, 241 U.S. 48, 36 S.Ct. 510, 60 L.Ed. 880 (holding invalid a license tax on maintaining an express office at which C. O. D. interstate shipments of intoxicating liquors were delivered and the purchase price collected).

⁷⁸ *Puget Sound Stevedoring Co. v. State Tax Commission of State of Wash.*, 302 U.S. 90, 58 S.Ct. 72, 82 L.Ed. 68.

⁷⁹ *McCall v. State of California*, 136 U.S. 104, 10 S.Ct. 881, 34 L.Ed. 391; *Norfolk & W. R. Co. v. Com. of Pennsylvania*, 136 U.S. 114, 10 S.Ct. 958, 34 L.Ed. 394.

or foreign transportation only, and acting for them not only in soliciting traffic but also in arranging details connected with its loading and delivery, is also deemed to be exclusively engaged in interstate or foreign commerce, as the case may be. A state may not subject its activities to a license tax.⁸⁰ The operation of sleeping cars in interstate commerce by a company not owning the railroad over which they are operated is interstate commerce immune to state license taxes.⁸¹ Their operation in intrastate commerce to any extent may be taxed.⁸² The transportation of natural gas by pipe line from one state into another is interstate commerce, and its delivery by the producing company to a local distributing company is a part thereof. The state may not, therefore, require the former to pay a license tax with respect to its activities within the state.⁸³ A producing company is, however, engaged in local commerce so far as it makes direct delivery to the ultimate consumer through its own local distribution system, even as to natural gas produced outside of the state. It may validly be required to pay a privilege tax thereon.⁸⁴ License taxes on the business of sending interstate telegrams, or on each such telegram sent, conflict with the commerce clause.⁸⁵ Radio broadcasting from a station with a range extending beyond a state's borders is interstate commerce, and a license tax thereon is invalid.⁸⁶ A state tax on the privilege of owning or operating a radio receiving set is equally invalid as a direct burden upon interstate commerce.⁸⁷ A business is not, however, interstate commerce merely because its activities contemplate and result in

⁸⁰ *Texas Transport & Terminal Co. v. New Orleans*, 264 U.S. 150, 44 S.Ct. 242, 68 L.Ed. 611, 34 A.L.R. 907. See, also, *Di Santo v. Commonwealth of Pennsylvania*, 273 U.S. 34, 47 S.Ct. 267, 71 L.Ed. 524 (holding a license requirement an invalid exercise of police power as applied to such a case). See dissenting opinions in these cases for forceful statement of the position that such tax and license requirements do not unreasonably burden interstate and foreign commerce.

⁸¹ *Pickard v. Pullman Southern Car Co.*, 117 U.S. 34, 6 S.Ct. 635, 29 L.Ed. 785.

⁸² *Pullman Co. v. Adams*, 189 U.S. 420, 23 S.Ct. 494, 47 L.Ed. 877; *Al-*

len v. Pullman's Palace Car Co., 191 U.S. 171, 24 S.Ct. 39, 48 L.Ed. 134.

⁸³ *State Tax Commission of Mississippi v. Interstate Natural Gas Co.*, 284 U.S. 41, 52 S.Ct. 62, 76 L.Ed. 156.

⁸⁴ *East Ohio Gas Co. v. State Tax Commission*, 283 U.S. 465, 51 S.Ct. 499, 75 L.Ed. 1171.

⁸⁵ *Western Union Tel. Co. v. Texas*, 105 U.S. 460, 26 L.Ed. 1067.

⁸⁶ *Fisher's Blend Station, Inc. v. State Tax Commission*, 297 U.S. 650, 56 S.Ct. 608, 80 L.Ed. 956.

⁸⁷ *Station WBT v. Poulnot, D.C.*, 46 F.2d 671.

the interstate movement of goods or persons,⁸⁸ nor because the goods sold in its regular course are outside the state.⁸⁹ State license taxes on production do not violate the commerce clause even though the goods are being produced for sale in interstate or foreign markets. The most important recent decision applying that principle sustained a state license tax on the generation of electricity, based on the Kilowatt hours generated, although the bulk of it was generated for transmission to other states, and was in fact so transmitted.⁹⁰

License Taxes on Use of Instrumentalities of Interstate or foreign Commerce

The expansion of motor vehicle traffic over highways furnished at public expense has led to the widespread adoption of excise taxes of one form or another on the distribution and sale of gasoline. The desire to make such traffic contribute to the cost of highway construction and maintenance has led many states to tax not only its sale within the state but also its use therein when purchased without the state. A tax on its use is invalid so far as it is used to furnish the motive power for propelling boats or vehicles operating within the state in interstate or foreign transportation only.⁹¹ The theory on which such tax is held invalid is that, since an excise on such transportation is bad, equally so is one upon the use of the means by which it is effected. An excise tax on a local sale of gasoline is not rendered invalid by the fact that it is purchased to be, and in fact is, used to propel vehicles used exclusively in inter-

⁸⁸ *Williams v. Fears*, 179 U.S. 270, 21 S.Ct. 128, 45 L.Ed. 186 (sustaining annual state license tax upon persons engaged in hiring laborers to be employed beyond the limits of the state).

⁸⁹ *Ware & Leland v. Mobile County*, 209 U.S. 405, 28 S.Ct. 526, 52 L.Ed. 855, 14 Ann.Cas. 1031.

⁹⁰ *Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 52 S.Ct. 548, 76 L.Ed. 1038. See, also, *South Carolina Power Co. v. South Carolina Tax Commission*, D.C., 52 F.2d 515, affirmed per curiam, 286 U.S. 525, 52 S.Ct. 494, 76 L.Ed. 1268, which also

sustained a sales tax on the local sale of power produced without the state; the lower court treated the interstate journey as ending in that situation, at the transformer. See, also, *Hope Natural Gas Co. v. Hall*, 274 U.S. 284, 47 S.Ct. 639, 71 L.Ed. 1049, and *Federal Compress & Warehouse Co. v. McLean*, 291 U.S. 17, 54 S.Ct. 267, 78 L.Ed. 622.

⁹¹ *Helson v. Com. of Kentucky by Board*, 279 U.S. 245, 49 S.Ct. 279, 73 L.Ed. 683 (interstate ferry); *Bingaman v. Golden Eagle Western Lines*, 297 U.S. 626, 56 S.Ct. 624, 80 L.Ed. 928 (interstate buses).

state commerce.⁹² The tax in such case is not on its use therein as was the fact in *Helson v. Kentucky*. It was held at practically the same time that the commerce clause also permits a state to get the equivalent of a sales tax on gasoline purchased outside it if it is brought into the state for storage and subsequently withdrawn therefrom for use. The tax in such case is on the withdrawal of the gasoline from storage, which is an act completed before interstate commerce begins. It is valid even though the gasoline is withdrawn for use in propelling interstate airplanes or other vehicles.⁹³ The net result of these several decisions is that the *Helson Case* is in effect limited to a tax that is in terms conditioned on the use of the gasoline in interstate commerce. A state can, therefore, by a judiciously phrased law impose the equivalent of its tax on local gasoline sales except where the fuel is purchased outside it and used within it in interstate or foreign transportation without preliminary storage within the state. What seemed like an extremely favorable decision for operators of interstate transport facilities has been severely limited in the interest of requiring such transportation to make its fair contribution to the support of government.

License Taxes upon Interstate and Foreign Sales

The validity under the commerce clause of state license taxes on the business of selling goods, and state excise taxes upon specific sales thereof, has been passed upon by the Supreme Court in many cases. Their validity with respect to "original package" sales has already been discussed. The present discussion will be limited to other classes of sales. The commerce clause does not prohibit a state from imposing a non-discriminatory license tax on the business of making local sales, or non-discriminatory excise taxes upon local sales, merely because the goods were imported from abroad or from another state.⁹⁴ It does, however, prohibit such taxes upon the business of making or negotiating interstate sales and sales in foreign commerce, and excise taxes upon specific sales of foreign or interstate imports.⁹⁵

⁹² *Eastern Air Transport v. South Carolina Tax Commission*, 285 U.S. 147, 52 S.Ct. 340, 76 L.Ed. 673.

⁹³ *Edelman v. Boeing Air Transport, Inc.*, 289 U.S. 249, 53 S.Ct. 591, 77 L.Ed. 1155; *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U.S. 249,

53 S.Ct. 345, 77 L.Ed. 730, 87 A.L.R. 1191.

⁹⁴ *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 36 S.Ct. 370, 60 L.Ed. 679, L.R.A.1917A, 421, Ann.Cas.1917B, 455.

⁹⁵ *Crenshaw v. State of Arkansas*, 227 U.S. 389, 33 S.Ct. 294, 57 L.Ed. 565.

The same prohibition extends to the business of making within the state sales of goods within it to be shipped to points outside it, and excise taxes upon specific sales of that character.⁹⁶ As is usual, the cases have been chiefly concerned with what constitute interstate selling activities and interstate sales. The local peddling of goods that are already within the state, and sales thereof by peddlers, may be taxed even though the goods are foreign or interstate imports, since the sale occurs after foreign or interstate commerce thereof has ended.⁹⁷ The same is true where the sales are made from local storehouses in which they have been stored in anticipation of such local sales.⁹⁸ It is equally well established that soliciting orders for goods to be filled by shipment thereof from points without the state is interstate or foreign commerce, as the case may be, and that a state may not subject it to a license or excise tax.⁹⁹ Deliveries within the state in response to such orders are similarly immune.¹ The method of delivery need not be direct to the purchaser. The goods may be sent to a depot or storehouse from which a local representative of the seller distributes them, and his activities are an integral part of the interstate sale and, as such, immune to state license or excise taxes.² The immunity has even been extended to protect the sale and delivery of goods not previously ordered if the original arrangement accorded the vendee the privilege of buying it,³ but not where that factor is absent.⁴ The case intermediate between that of a local sale of goods already within the state and the sale of goods to be shipped

⁹⁶ *Heyman v. Hays*, 236 U.S. 173, 35 S.Ct. 403, 59 L.Ed. 527.

⁹⁷ *Singer Sewing Machine Co. v. Brickell*, 233 U.S. 304, 34 S.Ct. 493, 58 L.Ed. 974; *Wagner v. City of Covington*, 251 U.S. 95, 104, 40 S.Ct. 93, 64 L.Ed. 157, 168.

⁹⁸ *Armour Packing Co. v. Lacy*, 200 U.S. 226, 26 S.Ct. 232, 50 L.Ed. 451.

⁹⁹ *Robbins v. Shelby County Taxing Dist.*, 120 U.S. 489, 7 S.Ct. 592, 30 L.Ed. 694; *Caldwell v. State of North Carolina*, 187 U.S. 622, 23 S.Ct. 229, 47 L.Ed. 336; *Wagner v. City of Covington*, 251 U.S. 95, 104, 40 S.Ct. 93, 64 L.Ed. 157, 168.

¹ *Stewart v. People of State of Michigan*, 232 U.S. 665, 34 S.Ct. 476, 58 L.Ed. 786; *Rearick v. Pennsylvania*, 203 U.S. 507, 27 S.Ct. 159, 51 L.Ed. 295.

² *Stewart v. People of State of Michigan*, 232 U.S. 665, 34 S.Ct. 476, 58 L.Ed. 786; see, also, *Kehrer v. Stewart*, 197 U.S. 60, 25 S.Ct. 403, 49 L.Ed. 663.

³ *Dozier v. State of Alabama*, 218 U.S. 124, 30 S.Ct. 649, 54 L.Ed. 965, 28 L.R.A.,N.S., 264; *Davis v. Commonwealth of Virginia*, 236 U.S. 697, 35 S.Ct. 479, 59 L.Ed. 795.

⁴ *Wagner v. City of Covington*, 251 U.S. 95, 104, 40 S.Ct. 93, 64 L.Ed. 157, 168.

into the state by the vendor is that in which the contract of sale has reference to no specific goods and does not necessarily contemplate or require for its execution the shipment of goods in interstate or foreign commerce. The sale is in such case deemed a purely local one validly subject to a state excise tax even though in fact goods do move in interstate commerce as a result thereof. The interstate transportation is in such case deemed a merely incidental element in the transaction.⁵ A local sale cannot be converted into an interstate sale by manipulating the place of delivery so as to make it appear one requiring an interstate movement of the goods sold.⁶ The courts have been alert to restrict the protection of the commerce clause to sales that are in substance, rather than merely in form, the essential activities of interstate and foreign trade.

Compensating "Use" Taxes

The development of state sales taxes has forced upon states the need to devise a compensating tax to offset what would otherwise be a discriminatory tax against local sellers resulting from the states' inability to tax sales in interstate or foreign commerce. A tax on the local use of such foreign or interstate imports has been devised for that purpose. A state may tax the local use of such imports.⁷ It does not become invalid merely because employed to establish equality between local and interstate sales.⁸ The tax in the case last cited was so computed as to take account of any sale tax paid to the state of origin of the goods, and any sale or other use tax paid to the taxing state itself. It is intimated by the Court that nothing in its opinion is to be construed as implying that the commerce clause requires the local use tax to reflect sale or use taxes imposed by the state of origin of the goods. It is practically certain that it will not thus condition a state's right to impose such tax. The

⁵ *Willoil Corp. v. Pennsylvania*, 294 U.S. 169, 55 S.Ct. 358, 79 L.Ed. 838. See, also, *Broadnax v. State of Missouri*, 219 U.S. 285, 31 S.Ct. 238, 55 L.Ed. 219 (sustaining state stamp taxes on sales on commodity exchanges located within the state even though part of the goods sold are at the time moving in interstate commerce).

⁶ *Banker Bros. Co. v. Pennsylvania*, 222 U.S. 210, 32 S.Ct. 38, 56 L.

Ed. 168; *Superior Oil Co. v. Mississippi*, 280 U.S. 390, 50 S.Ct. 169, 74 L.Ed. 504.

⁷ *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 52 S.Ct. 681, 76 L.Ed. 1232, 84 A.L.R. 831.

⁸ *HENNEFORD v. SILAS MASON CO.*, 300 U.S. 577, 57 S.Ct. 524, 81 L.Ed. 814, *Black's Cas. Constitutional Law*, 2d, 308.

decision under discussion reflects the sound view that the commerce clause does not prevent a state from using its tax power to preserve equality of competitive conditions in its local markets between local and interstate vendors. The decision, however, would not permit the imposition of a use tax of the type prohibited by *Helson v. Kentucky* where the use is itself one in interstate or foreign commerce.⁹

Franchise Taxes

A state has no power to exclude a foreign corporation from transacting interstate or foreign commerce within it. A foreign corporation engaging in such commerce within a state exercises no privilege derived from that state, and cannot be required to pay a franchise tax imposed by it.¹⁰ A state may, however, forbid such corporation to engage in intrastate commerce within it, or impose on its grant of that privilege any conditions other than those that are unconstitutional.¹¹ It may require such corporation to pay for such privilege a properly measured tax. The tax may be imposed upon either the mere grant of such privilege or upon its exercise.¹² If the entire business conducted within the state during the year for which the tax is imposed is interstate or foreign commerce, the tax would be valid if imposed for the mere grant of the local privilege.¹³ This is on the same theory as that on which a state may levy a license tax for the privilege of engaging in an occupation consisting wholly of intrastate business even though in the year for which the license was issued the licensee's entire business consisted of interstate and foreign commerce.¹⁴ A state's right to charge for a privilege which it is free to withhold is not lost merely because he who has acquired it has for some reason failed to exercise it.

⁹ *Southern Pac. Co. v. Corbett*, D. C., 20 F.Supp. 940.

¹⁰ *Ozark Pipe Line Corp. v. Monier*, 266 U.S. 555, 45 S.Ct. 184, 69 L. Ed. 439; *Alpha Portland Cement Co. v. Massachusetts*, 268 U.S. 203, 45 S.Ct. 477, 69 L.Ed. 916, 44 A.L.R. 1219.

¹¹ *Horn Silver Mining Co. v. People of State of New York*, 143 U.S. 305, 12 S.Ct. 403, 36 L.Ed. 164; *People of State of New York ex rel. Parke, Davis & Co. v. Roberts*, 171 U. S. 658, 19 S.Ct. 58, 70, 43 L.Ed. 323.

¹² See discussion in *Anglo-Chilean Nitrate Sales Corp. v. Alabama*, 288 U.S. 218, 53 S.Ct. 373, 77 L.Ed. 710.

¹³ *Anglo-Chilean Nitrate Sales Corp. v. Alabama*, 288 U.S. 218, 53 S.Ct. 373, 77 L.Ed. 710. See, also, *Detroit International Bridge Co. v. Corporation Tax Appeal Board of Michigan*, 287 U.S. 295, 53 S.Ct. 137, 77 L.Ed. 314 (this case, however, involved a domestic corporation).

¹⁴ *Ficklen v. Shelby County Taxing Dist.*, 145 U.S. 1, 12 S.Ct. 810, 36 L.Ed. 601.

If, however, the state franchise tax is upon the exercise of the local privilege, it may not be collected from one whose entire business for the year for which it was levied consisted of interstate or foreign commerce. A reasonable construction of the statute imposing such a tax would prevent its accrual in such a case since one requirement for its accrual would be absent, but the result has in fact been based on the theory that it would violate the commerce clause to impose the tax in such case.¹⁵ The character of a foreign corporation's activities are thus the vital factor in determining its liability for a state franchise tax in most cases. If all of its activities are interstate commerce, or connected with its interstate commercial activities within a state, it is immune to a state franchise tax imposed upon the transaction of business in corporate form.¹⁶ It may, however, be required to pay such tax if any part of its business within a state is intrastate commerce.¹⁷ Maintaining its general offices within it, and conducting its stockholders' meetings therein, are local activities for this purpose.¹⁸ A domestic corporation owes its corporate existence to the state of its incorporation. That state may tax it for that privilege, as well as for the grant to it of the privilege of transacting local business within the state and the actual exercise thereof.¹⁹ The power of the state to impose a franchise tax on a domestic corporation for engaging within it in interstate or foreign commerce only is undetermined. Such state can probably avoid whatever limitations there may be upon its power to do so by taxing the franchise to exist which such corporation derives from it.

Taxes on Local Commerce as Burdens upon Interstate Commerce

It is now an established principle that the commerce clause invalidates a state tax on local commerce that directly burdens

¹⁵ *Anglo-Chilean Nitrate Sales Corp. v. Alabama*, 288 U.S. 218, 53 S. Ct. 373, 77 L.Ed. 710.

¹⁶ *Cheney Bros. et al. v. Commonwealth of Massachusetts*, 246 U.S. 147, 38 S.Ct. 295, 62 L.Ed. 632.

¹⁷ *Hump Hairpin Mfg. Co. v. Emerson*, 258 U.S. 290, 42 S.Ct. 305, 66 L.Ed. 622; *Southern Natural Gas Corp. v. Alabama*, 301 U.S. 148, 57 S.Ct. 696, 81 L.Ed. 970.

¹⁸ *ATLANTIC LUMBER CO. v. COMMISSIONER OF CORPORA-*

TIONS AND TAXATION OF MASS., 298 U.S. 553, 56 S.Ct. 887, 80 L.Ed. 1328, *Black's Cas. Constitutional Law*, 2d, 315; cf. *Ozark Pipe Line Co. v. Monier*, 266 U.S. 555, 45 S.Ct. 184, 69 L.Ed. 439.

¹⁹ *Detroit International Bridge Co. v. Corporation Tax Appeal Board of Michigan*, 287 U.S. 295, 53 S.Ct. 137, 77 L.Ed. 314; *Detroit International Bridge Co. v. Corporation Tax Appeal Board of Michigan*, 294 U.S. 83, 55 S.Ct. 332, 79 L.Ed. 777.

interstate or foreign commerce. The principal problem has been to determine when such a tax directly burdens such commerce. A license tax for the privilege of engaging in local commerce does not directly burden interstate or foreign commerce merely because the business actually transacted during the period for which the tax was imposed consisted wholly of interstate and foreign commerce.²⁰ It does not have that effect merely because both the intrastate and interstate business are in fact inseparable.²¹ Nor is there a general rule of law that such tax is void unless the taxpayer is free both in law and in fact to withdraw from the local business without discontinuing its interstate business.²² It has been intimated that if the tax produces a loss on the local business which would have to be absorbed by the interstate business it might be invalid under the commerce clause if the taxpayer were prohibited by law from withdrawing from the local business.²³ There is, however, a contrary intimation suggesting that the taxpayer procure state consent to higher rates to make good the deficit in its local operations.²⁴ The state of the law on this matter must, therefore, be regarded as unsettled.²⁵ If, however, a privilege tax is exacted from a person engaged in both intrastate and interstate business within a state, it will be held invalid if it is indivisible and indiscriminate in its application, since it then necessarily burdens interstate commerce.²⁶

²⁰ *Ficklen v. Shelby County Taxing Dist.*, 145 U.S. 1, 12 S.Ct. 810, 36 L. Ed. 601. See, also, *J. E. Raley & Bros. v. Richardson*, 264 U.S. 157, 44 S.Ct. 256, 68 L.Ed. 615 (rejecting claim that tax was invalid because but a small fraction of the business consisted of intrastate commerce).

²¹ *Pacific Telephone & Telegraph Co. v. State Tax Commission of Washington*, 297 U.S. 403, 56 S.Ct. 522, 80 L.Ed. 760, 105 A.L.R. 1.

²² *Pacific Telephone & Telegraph Co. v. State Tax Commission of Washington*, 297 U.S. 403, 56 S.Ct. 522, 80 L.Ed. 760, 105 A.L.R. 1.

²³ *Pacific Telephone & Telegraph Co. v. State Tax Commission of Washington*, 297 U.S. 403, 56 S.Ct. 522, 80 L.Ed. 760, 105 A.L.R. 1;

Postal Telegraph-Cable Co. v. City of Richmond, 249 U.S. 252, 39 S.Ct. 265, 63 L.Ed. 590. Cf. *Williams v. City of Talladega*, 226 U.S. 404, 33 S.Ct. 116, 57 L.Ed. 275 (containing a contrary intimation).

²⁴ *Postal Telegraph-Cable Co. v. Fremont*, 255 U.S. 124, 41 S.Ct. 279, 65 L.Ed. 545.

²⁵ See, also, *Pullman Co. v. Adams*, 189 U.S. 420, 23 S.Ct. 494, 47 L.Ed. 877; *Allen v. Pullman's Palace Car Co.*, 191 U.S. 171, 24 S.Ct. 39, 48 L. Ed. 134.

²⁶ *Cooney v. Mountain States Telephone & Telegraph Co.*, 294 U.S. 334, 55 S.Ct. 477, 79 L.Ed. 934 (holding invalid a license tax upon the business of furnishing telephone service based upon the number of instruments used therein).

The only cases in which the principle discussed in the preceding paragraph has been held to invalidate a state tax have involved state franchise taxes on foreign corporations engaged within a state in both intrastate and interstate commerce. The invalidity has been based on the methods used for measuring the amount of the tax. A franchise tax measured by the total authorized capital stock has invariably been held invalid.²⁷ Such a tax is deemed to impose a prohibited burden because it in effect taxes the corporation's entire business, including the interstate, and its property wherever situated and employed in its business. It was stated that interstate commerce would be destroyed if every state were permitted to tax on that basis. A tax thus measured is invalid not only as applied to foreign corporations engaged in interstate or foreign transportation but also as applied to those engaged in other forms of interstate or foreign commerce.²⁸ The view that invalidity could be avoided by fixing a reasonable maximum which was once followed²⁹ has now been repudiated.³⁰ The theory on which these cases proceed would invalidate a franchise tax measured by total issued capital stock, or by that plus surplus, since these too represent the entire corporate business and property. It has been so decided.³¹ A tax based on that proportion of the issued capital stock, or of that plus surplus, which the property, or property and business, within the state bears to its total property, or property and business, avoids this objection and is valid.³² But the application of a similar ratio to the authorized stock is still invalid.³³ This must be on the theory that authorized but unissued capital stock has no relation whatever to the value of the privilege granted. These principles would equally invalidate any such tax measured by total assets, receipts or net income, but

²⁷ *Western Union Telegraph Co. v. Kansas*, 216 U.S. 1, 30 S.Ct. 190, 54 L.Ed. 355; *Cudahy Packing Co. v. Hinkle*, 278 U.S. 460, 49 S.Ct. 204, 73 L.Ed. 454.

²⁸ *International Paper Co. v. Commonwealth of Massachusetts*, 246 U.S. 135, 38 S.Ct. 292, 62 L.Ed. 624, Ann.Cas.1918C, 617.

²⁹ *Baltic Mining Co. v. Commonwealth of Massachusetts*, 231 U.S. 68, 34 S.Ct. 15, 58 L.Ed. 127.

³⁰ *Cudahy Packing Co. v. Hinkle*,

278 U.S. 460, 49 S.Ct. 204, 73 L.Ed. 454.

³¹ *Looney v. Crane Co.*, 245 U.S. 178, 38 S.Ct. 85, 62 L.Ed. 230.

³² *Hump Hairpin Mfg. Co. v. Emmerson*, 258 U.S. 290, 42 S.Ct. 305, 66 L.Ed. 622; *Western Cartridge Co. v. Emmerson*, 281 U.S. 511, 50 S.Ct. 333, 74 L.Ed. 1004; *St. Louis & S. W. R. Co. v. State of Arkansas*, 235 U.S. 350, 35 S.Ct. 99, 59 L.Ed. 265.

³³ *Air-Way Electric Appliance Corp. v. Day*, 266 U.S. 71, 45 S.Ct. 12, 69 L.Ed. 169.

validate taxes measured by a proportion thereof allocated to the state on some fair basis.³⁴ Although similar principles were once applied in determining the validity of entrance fees charged foreign corporations,³⁵ that position appears now to have been repudiated.³⁶ A state may, however, measure its franchise tax on domestic corporations engaged in both intrastate and interstate commerce within it by methods that would be invalid as applied to foreign corporations.³⁷ Although the theory behind this difference has received no adequate judicial treatment, it is probably based on the fact that there is but one state of incorporation while there may be any number of states with respect to which a corporation is a foreign corporation. The possible burden upon interstate commerce is relatively slight when the state of incorporation is permitted to measure a franchise tax in a way that might prove exceedingly burdensome if all other states were given the same latitude.

DISCRIMINATORY TAXES AND CHARGES

172. A state tax that operates to discriminate against interstate or foreign commerce is prohibited by the commerce clause.
173. A state may validly charge those engaged in interstate or foreign commerce within it for services rendered, or facilities furnished, them by it, but may neither discriminate against such commerce in making such charges nor use them as a disguised means for subjecting such commerce to taxes that it could not validly impose as taxes.

³⁴ *Bass-Ratcliff & Gretton Co. v. State Tax Commission*, 266 U.S. 271, 45 S.Ct. 82, 69 L.Ed. 282.

³⁵ *Looney v. Crane Co.*, 245 U.S. 178, 38 S.Ct. 85, 62 L.Ed. 230. See, also, *Union Pacific R. R. Co. v. Public Service Commission of Missouri*, 248 U.S. 67, 39 S.Ct. 24, 63 L.Ed. 181 (this case involved fee for approval of issuance of securities by a foreign railroad corporation a part only of whose lines were located within the state demanding the fee).

³⁶ *Atlantic Refining Co. v. Virginia*, 302 U.S. 22, 58 S.Ct. 75, 82 L.Ed. 24.

³⁷ *Kansas City, Ft. S. & M. Ry. Co. v. Botkin*, 240 U.S. 227, 36 S.Ct.

261, 60 L.Ed. 617; *Kansas City, M. & B. R. Co. v. Stiles*, 242 U.S. 111, 37 S.Ct. 58, 61 L.Ed. 176. The tax in each case was measured by the total capital stock of the taxpayer although a part only of its property was situated within the taxing state. Some of the language in the opinions raises a query as to whether the decisions are limited to situations in which the factors indicated in such language are present. See *St. Louis-San Francisco Ry. Co. v. Middlekamp*, 256 U.S. 226, 41 S.Ct. 489, 65 L.Ed. 905 (sustaining franchise tax on domestic corporation measured by a portion of the capital stock allocated on an assets basis).

174. A state may not prohibit or interfere with interstate or foreign commerce in devising methods for collecting taxes that it may validly impose.

A state is prohibited by the commerce clause from so exercising its most distinctive local powers as to discriminate against interstate or foreign commerce. An exercise of its taxing power that produces that effect is, therefore, invalid. The imposition of a license tax on those engaged in making local sales of liquor that in effect taxes only the sale of liquors produced without the state is invalid.³⁸ A license tax on only those peddlers who peddle interstate or foreign imports is also invalid.³⁹ Such goods are also protected against discriminatory property taxation after they have become incorporated with the general mass of property within the state.⁴⁰ A discriminatory difference in rates against such goods or their sale is equally invalid.⁴¹ A state is even prevented by the commerce clause from discriminating against interstate and foreign commerce in charging for furnishing facilities for whose use it may exact payment.⁴² That clause prohibits such discrimination whatever be the means by which it is produced.⁴³ It does not, however, prevent a state from levying a non-discriminatory tax on the use within it of goods shipped into it by means of interstate sales in order to prevent its local sales tax from creating a discrimination against local products and sellers.⁴⁴

A state may validly charge those engaged in interstate or foreign commerce within it for services rendered, and facilities furnished, them.⁴⁵ It may not, however, use this right in such

³⁸ *Walling v. State of Michigan*, 116 U.S. 446, 6 S.Ct. 454, 29 L.Ed. 691. For present status of such fees, see Section 162.

³⁹ *Welton v. Missouri*, 91 U.S. 275, 23 L.Ed. 347; *Webber v. Virginia*, 103 U.S. 344, 26 L.Ed. 565.

⁴⁰ *I. M. Darnell & Son Co. v. Memphis*, 208 U.S. 113, 28 S.Ct. 247, 52 L.Ed. 413.

⁴¹ *Cook v. Pennsylvania*, 97 U.S. 566, 24 L.Ed. 1015.

⁴² *Guy v. Baltimore*, 100 U.S. 434, 25 L.Ed. 743. See, also, statement in *Interstate Busses Corp. v. Blodgett*,

276 U.S. 245, 48 S.Ct. 230, 72 L.Ed. 551.

⁴³ *Bethlehem Motors Co. v. Flynt*, 256 U.S. 421, 41 S.Ct. 571, 65 L.Ed. 1029. For state tax held not discriminatory see *American Steel & Wire Co. v. Speed*, 192 U.S. 500, 24 S.Ct. 365, 48 L.Ed. 538.

⁴⁴ *HENNEFORD v. SILAS MASON CO.*, 300 U.S. 577, 57 S.Ct. 524, 81 L.Ed. 814, *Black's Cas. Constitutional Law*, 2d, 308.

⁴⁵ *Huse v. Glover*, 119 U.S. 543, 7 S.Ct. 313, 30 L.Ed. 487 (tolls for passage through locks); *Sands v.*

manner as to impose upon such commerce a disguised tax of the kind which it could not impose as a tax. It is this principle that invalidates charges for the use of its highways by interstate carriers that are in excess of the reasonable compensation therefor and of the reasonable expenses made necessary by their use of such highways. The principles employed in determining what is a proper compensation charge has already been considered.⁴⁶

The commerce clause prohibits a state from enforcing the collection of a valid tax by methods that impose a direct burden upon interstate or foreign commerce. It may not prohibit the taxpayer from engaging in such commerce in order to compel it to pay such taxes,⁴⁷ and it has even been held that it could not oust a foreign corporation, engaged within it in both intrastate and interstate commerce, from conducting the former where this would unduly burden its interstate activities.⁴⁸ A state is thus limited to other means for collecting its taxes.

IMPOSTS AND TONNAGE DUTIES

175. A state may not, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.
176. A state may not, without the consent of Congress, lay any duty of tonnage.

Imposts on Imports and Exports

The leading case construing the prohibition against state duties on imports or exports⁴⁹ is that of *Brown v. Maryland*.⁵⁰ It was therein stated that it prohibits the taxation not only of the importation of goods, but also of the goods themselves as long as they have not been incorporated into the general mass of property within the state. It was held that a tax on their sale, or on the business of selling them, prior to the time of such incorporation constituted a prohibited impost thereon. A state

Manistee River Imp. Co., 123 U.S. 288, 8 S.Ct. 113, 31 L.Ed. 149 (tolls for repaying state for costs of clearing river of obstructions to navigation).

⁴⁶ See Section 157.

⁴⁷ *Western Union Tel. Co. v. Att'y*

Gen. of Com. of Massachusetts, 125 U.S. 530, 8 S.Ct. 961, 31 L.Ed. 790.

⁴⁸ *Western Union Tel. Co. v. Kansas ex rel. Coleman*, 216 U.S. 1, 30 S.Ct. 190, 54 L.Ed. 355.

⁴⁹ U.S.C.A.Const. Art. 1, Sec. 10.

⁵⁰ 12 Wheat. 419, 6 L.Ed. 678.

franchise tax on a foreign corporation whose business for the year for which the tax was levied consisted wholly of importing goods, storing them, and selling them in their original package, violates this prohibition.⁵¹ The ultimate test is not the subject on which the tax is imposed. If its effect is a direct tax upon the import, the prohibition applies to it. The same principle defines the scope of the prohibition against state imposts upon exports. It was because the taxes involved directly taxed them that a stamp box on the bill of lading for an export,⁵² and a tax on the gross receipts from the business of exporting,⁵³ have been held to violate this provision. The term imports and exports includes only goods imported into a state from, or exported therefrom to, a foreign country.⁵⁴ This constitutional provision does not apply to persons.⁵⁵

Tonnage Duties

The prohibition against state tonnage duties has recently been stated to have been due to a desire to supplement the prohibition against state duties on imports and exports by forbidding a "corresponding tax on the privilege of access by vessels to the ports of a state."⁵⁶ The prohibition includes all taxes and duties, however designated, the practical operation of which is to "impose a charge for the privilege of entering, trading in, or lying in a port."⁵⁷ The prohibition is not limited to those based on tonnage, nor is the fact that a charge is computed on that basis conclusive that it is a tonnage duty.⁵⁸ A state is not pro-

⁵¹ *Anglo-Chilean Nitrate Sales Corp. v. Alabama*, 288 U.S. 218, 53 S.Ct. 373, 77 L.Ed. 710.

⁵² *Almy v. California*, 24 How. 169, 16 L.Ed. 644.

⁵³ *Crew Levick Co. v. Pennsylvania*, 245 U.S. 292, 38 S.Ct. 126, 62 L. Ed. 295. For other cases discussing what constitute, or do not constitute, taxes upon imports or exports, see *Selliger v. Kentucky*, 213 U.S. 206, 29 S.Ct. 449, 53 L.Ed. 761; *People of State of New York ex rel. Edward & John Burke v. Wells*, 208 U.S. 14, 28 S.Ct. 193, 52 L.Ed. 370.

⁵⁴ The early decisions were contra; see *Almy v. California*, 24 How. 169, 16 L.Ed. 644.

⁵⁵ *People of State of New York v. Compagnie Generale Transatlantique*, 107 U.S. 59, 2 S.Ct. 87, 27 L.Ed. 383.

⁵⁶ *CLYDE MALLORY LINES v. STATE OF ALABAMA*, 296 U.S. 261, 56 S.Ct. 194, 80 L.Ed. 215, *Black's Cas. Constitutional Law*, 2d, 317.

⁵⁷ *CLYDE MALLORY LINES v. STATE OF ALABAMA*, 296 U.S. 261, 56 S.Ct. 194, 80 L.Ed. 215, *Black's Cas. Constitutional Law*, 2d, 317; *Inman S. S. Co. v. Tinker*, 94 U.S. 238, 24 L. Ed. 118; *State Tonnage Tax Cases*, 12 Wall. 204, 20 L.Ed. 370.

⁵⁸ *CLYDE MALLORY LINES v. STATE OF ALABAMA*, 296 U.S. 261, 56 S.Ct. 194, 80 L.Ed. 215, *Black's Cas. Constitutional Law*, 2d, 317.

hibited by this provision from charging for facilities and services furnished by it to and enjoyed by vessels.⁵⁹ The services for which a vessel may be made to pay are not limited to specific services rendered to it, but include the general benefit that it derives from being provided with a safe and effectively policed and regulated harbor.⁶⁰ A state will not, however, be permitted to evade this prohibition by imposing a prohibited tonnage duty under the guise of a service charge.⁶¹ An attempt to deduce from this provision a prohibition against state property taxes on vessels plying within a state has been rejected.⁶² The prohibition protects all vessels plying the navigable waters of the United States regardless of the character of the commerce in which they are engaged.

⁵⁹ *Keokuk Northern Line Packet Co. v. Keokuk*, 95 U.S. 80, 24 L.Ed. 377; *Clyde Mallory Lines v. Alabama*, 296 U.S. 261, 56 S.Ct. 194, 80 L.Ed. 215.

⁶⁰ *CLYDE MALLORY LINES v. STATE OF ALABAMA*, 296 U.S. 261,

56 S.Ct. 194, 80 L.Ed. 215, *Black's Cas. Constitutional Law*, 2d, 317.

⁶¹ *Southern S. S. Co. v. Masters & Wardens of Port of New Orleans*, 6 Wall. 31, 18 L.Ed. 749.

⁶² *Wheeling, P. & C. Transportation Co. v. Wheeling*, 99 U.S. 273, 25 L.Ed. 412.

CHAPTER 10

OTHER FEDERAL LEGISLATIVE POWERS

- 177. Patents and Copyrights.
- 178. Weights and Measures.
- 179. Bankruptcy.
- 180. The Postal Power.
- 181. Federal Territory and Property.
- 182-183. Control of Aliens and Naturalization.
- 184. War and Military Powers.
- 185. Piracies and Violations of the Law of Nations.
- 186-190. Treaties.

PATENTS AND COPYRIGHTS

177. The Congress has the power "to promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

The fiscal and commerce powers are those that have received the most extensive judicial construction. Their subject-matter is of such character that the impact of exercises thereof upon the nation's economic life has been of the utmost importance. There are, however, certain other powers the primary purpose of which is the promotion of certain fairly definite national economic interests. The power to grant patents and that of establishing uniform bankruptcy laws are the most important of them.

Patents

The power of Congress to make laws on the subject of patents was granted to it to promote the economic development of the nation by conferring upon inventors a monopoly of the use and sale of their inventions during a limited period. It may exercise it by the enactment of either general or special laws.¹ It lies within the discretion of Congress to determine the conditions upon which a patent shall be granted, and the extent of the

¹ *Fire-Extinguisher Mfg. Co. v. Graham, C.C.*, 16 F. 543; *Evans v. Jordan, Fed.Cas.No.4,564*.

rights that the patent shall confer upon its owner. The right of the owner of a patent is a property right the sale and transfer of which a state may regulate so far as its regulations do not conflict with federal legislation. It is a right which a state may validly tax,² although that was at one time denied.³ The state has an equal power to deal with or tax the tangible property in which the invention or discovery is embodied.⁴ It would undoubtedly be denied the power to discriminate against such property in enacting regulatory or tax legislation merely on the grounds that it was protected by a patent.

Copyrights

The power to secure to authors the exclusive right to their writings for limited times confers upon Congress the power to prescribe the conditions upon which such right shall be enjoyed.⁵ It has exercised it by the enactment of copyright legislation. A provision giving authors the exclusive right to dramatize their work is valid as applied to pantomime dramatizations of a copyrighted work by means of moving-picture films.⁶

Trade-marks

A trade-mark is neither an invention, a discovery, nor a writing within the meaning of the clause of the Constitution being considered in this section. The Congress has the power to legislate for the protection of trade-marks only so far as they are or may be used in interstate or foreign commerce.⁷

² Fox Film Corp. v. Doyal, 286 U.S. 123, 52 S.Ct. 546, 76 L.Ed. 1010 (the case involved right of a state to include income from copyrights in measuring a corporate franchise tax, but its reasoning would undoubtedly be held to apply to all state taxes on both patents and copyrights other than discriminatory taxes).

³ Long v. Rockwood, 277 U.S. 142, 48 S.Ct. 463, 72 L.Ed. 824 (the case involved an income tax on royalties received by the owner of the patent; it was expressly overruled in case cited in footnote 2).

⁴ Patterson v. Kentucky, 97 U.S. 501, 24 L.Ed. 1115; Webber v. Virginia, 103 U.S. 344, 26 L.Ed. 565; Ozan Lumber Co. v. Union County National Bank, 207 U.S. 251, 28 S.Ct. 89, 52 L.Ed. 195.

⁵ Wheaton v. Peters, 8 Pet. 591, 8 L.Ed. 1055.

⁶ Kalem Co. v. Harper Bros., 222 U.S. 55, 32 S.Ct. 20, 56 L.Ed. 92, Ann.Cas.1913A, 1285.

⁷ Trade-Mark Cases, 100 U.S. 82, 25 L.Ed. 550.

WEIGHTS AND MEASURES

178. The Constitution confers upon Congress the power to "fix the standard of weights and measures. This grant is not exclusive, and the states may exercise a similar power except insofar as the field has been occupied by national legislation.⁸

BANKRUPTCY

179. The Congress is invested with the power of enacting uniform laws on the subject of bankruptcies throughout the United States. The most important limit on this power is the provision of the Fifth Amendment that no person shall be deprived of property without due process of law.

Extent of the Power

The principal questions that have arisen in connection with the bankruptcy power have concerned its scope, its effect upon the power of the states, and the constitutional limitations upon its exercise. The Supreme Court has expressly refused to determine its scope by use of the historical method of interpreting the provisions of the Constitution. It has, accordingly, refused to restrict it to bankruptcy legislation of the character known to English and Colonial law in force when the Constitution was adopted. It has, however, admitted that there are limits upon the extent of that power, but has declined to give them explicit definition.⁹ The tendency of bankruptcy legislation has been increasingly in the direction of protecting the interests of financially embarrassed debtors rather than to merely provide a suitable method of applying his assets to satisfying the claims of creditors. The purpose of the earlier acts was to insure the equal distribution of the debtor's assets among his creditors, and they have been said to have been "conceived in the view that the bankrupt was dishonest."¹⁰ They provided for involuntary proceedings only, and were limited to certain classes of debtors such as traders, bankers and brokers. The later acts

⁸ *Weaver v. Fegley*, 29 Pa. 27, 70 Am.Dec. 151.

⁹ *CONTINENTAL ILLINOIS NAT. BANK & TRUST CO. v. CHICAGO, R. I. & P. RY. CO.*, 294 U.S. 648, 55 S.Ct. 595, 79 L.Ed. 1110, *Black's Cas. Constitutional Law*, 2d, 322.

¹⁰ *CONTINENTAL ILLINOIS NAT. BANK & TRUST CO. v. CHICAGO, R. I. & P. RY. CO.*, 294 U.S. 648, 55 S.Ct. 595, 79 L.Ed. 1110, *Black's Cas. Constitutional Law*, 2d, 322.

have aimed at the relief of honest debtors from the burden of an oppressive debt in order to enable them to acquire a new start unhampered by their pre-existing debts. They have been said to have been based upon the assumption that the debtors "might be honest but unfortunate."¹¹ They have, therefore, not only extended the classes entitled to invoke their benefits, but permitted voluntary proceedings and provided for compositions with creditors even without an adjudication of bankruptcy.¹² The power may be exercised so as to provide a judicial proceeding for the reorganization of a corporation that is either insolvent or unable to meet its obligations as they mature, and a statute for that purpose may provide for enforcing upon dissenting security holders a plan of reorganization approved by the court and by stated majorities of the various classes of security holders.¹³ It is within the bankruptcy power to insure the effective functioning of such proceedings by empowering the bankruptcy courts to require secured creditors of the debtor corporation to postpone for a reasonable period resort to his security by its sale, but it has been clearly intimated that postponement for an unreasonable period would deny the secured creditor due process.¹⁴ The scope of the power thus appears to include the entire field of the relations between an insolvent or non-paying debtor and his creditors, and to permit the enactment of legislation for the orderly adjustment of those relations for the benefit of both the debtor and the creditors. The purposes for which it may be validly exercised include not only the equal distribution of a debtor's assets among his creditors but also the discharge of the debtor from his prior debts and the provision of voluntary or compulsory methods for adjusting the affairs of financially embarrassed debtors. It has been intimated that its purposes do not include that of supplying a debtor with capital with which to carry on business at his creditors' expense.¹⁵ This was later urged as a reason against

¹¹ CONTINENTAL ILLINOIS NAT. BANK & TRUST CO. v. CHICAGO, R. I. & P. RY. CO., 294 U.S. 648, 55 S.Ct. 595, 79 L.Ed. 1110, Black's Cas. Constitutional Law, 2d, 322.

¹² In re Reiman, 20 Fed.Cas. p. 490, No.11,673.

¹³ CONTINENTAL ILLINOIS NAT. BANK & TRUST CO. v. CHICAGO, R. I. & P. RY. CO., 294 U.S. 648, 55

S.Ct. 595, 79 L.Ed. 1110, Black's Cas. Constitutional Law, 2d, 322.

¹⁴ CONTINENTAL ILLINOIS NAT. BANK & TRUST CO. v. CHICAGO, R. I. & P. RY. CO., 294 U.S. 648, 55 S.Ct. 595, 79 L.Ed. 1110, Black's Cas. Constitutional Law, 2d, 322.

¹⁵ Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 55 S.Ct. 854, 79 L.Ed. 1593, 97 A.L.R.

a provision that provided a method for computing the value of a contingent provable claim while at the same time extinguishing it in its entirety. The contention was rejected on the score that the provision afforded an appropriate means for effecting an equitable distribution of the debtor's assets among his creditors.¹⁶

Limits upon the Exercise of the Power

The terms in which the power to enact bankruptcy laws is conferred upon Congress require that such laws be uniform throughout the United States.¹⁷ This requires geographical uniformity only, which is satisfied by having the same law prevail throughout the United States.¹⁸ It has been a standard feature of bankruptcy statutes enacted by Congress to recognize exemptions created by state laws in defining the property available for distribution to creditors. These laws have varied from state to state with the necessary result that the operative effect of the federal acts have varied in like manner. It has been held that the existence of such differences in their operation did not violate the requisite uniformity, and that the recognition of such local laws does not unlawfully delegate to the states any part of the legislative powers of Congress.¹⁹

The most important limit on the bankruptcy power is the provision of the Fifth Amendment that guarantees a person against being deprived of his property without due process of law. The very nature of the bankruptcy power implies that its exercise may deprive the creditor of his right to enforce the full measure of his claim against the debtor, and this clearly involves depriving him in fact of a valuable property right. The due process clause permits this to a limited extent as a means for achieving the objectives of the bankruptcy power. It prohibits only the unreasonable sacrifice of the creditor's rights, and, in determining what is unreasonable, the purpose for which he is compelled to forego his rights is as important a factor as is the extent of their sacrifice. The problem has

1106 (involving first Frazier-Lemke Act, 48 Stat. 1289).

¹⁶ *Kuehner v. Irving Trust Co.*, 299 U.S. 445, 57 S.Ct. 298, 81 L.Ed. 340.

¹⁷ U.S.C.A. Const. Art. 1, Section 8, Clause 4.

¹⁸ *Darling v. Berry*, C.C., 13 F. 659.

¹⁹ *Hanover Nat. Bank v. Moyses*, 186 U.S. 181, 22 S.Ct. 857, 46 L.Ed. 1113.

been extensively considered in the cases that have passed on the validity of legislation enacted during the depression that began in 1929. It has been held that dissenting minorities may be forced to accept the provisions of a reorganization agreement by the action of two-thirds in amount of the security holders of their respective classes if the agreement is fair and adequate in the opinion of the judge before whom the reorganization proceedings are being had.²⁰ A bankruptcy act must inevitably define not only the claims which may be proved but also the extent of their allowance. The latter is readily done where no contingency affects either their existence or amount, but involves great difficulties if they are contingent in either of these respects. A provision limiting the amount in such case to that defined by a definite principle is a reasonable means for securing a fair and equitable distribution of the debtor's estate among his creditors. It is, therefore, valid even though it forever deprives the creditor of a speculative value in excess of that limited amount by extinguishing the claim.²¹ Provisions of the kind considered in the two cases last cited have been held not to deprive creditors of their property without due process because they were reasonably necessary to render effective the statutory plan relating to the reorganization of corporate debtors which afforded the most practicable and fair method for effectuating the purposes of the bankruptcy power for such debtors.

The legislation of the depression period also introduced the principle of enlarging the rights of the debtor against his secured creditor. Prior acts had permitted the bankruptcy court to sell the security free of incumbrances if the lien were transferred to the proceeds of its sale. They had not permitted its sale to prejudice the lienor's interest in order to benefit other creditors or the debtor. Legislation that in effect deprives a secured creditor without compensation of substantive rights of substantial value in the specific property securing his claim, and transfers them to the debtor, violates the due process clause.²² The extent of the creditor's rights in the security depend upon the laws of the state in which the property is situat-

²⁰ *Campbell v. Alleghany Corp.*, 4 Cir., 75 F.2d 947.

²¹ *Kuehner v. Irving Trust Co.*, 299 U.S. 445, 57 S.Ct. 298, 81 L.Ed. 340.

²² *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 55 S.Ct. 854, 79 L.Ed. 1593, 97 A.L.R. 1106.

ed at the time when the creditor acquires his right in the security. A provision of a bankruptcy act passed after the security interest had been acquired was held to violate due process where it deprived the secured creditor of existing rights to retain the lien until the debt was paid, to realize upon the security by its judicial sale at a time to be determined by him, to protect his interest by bidding in the property at such sale, and to control the property during the period of the debtor's default.²³ Legislation that deprives him of some only of these rights may be valid or invalid, depending upon which of them are taken from him thereby. If the effect of depriving him thereof is merely to postpone his right to apply the security to his claim for a reasonable period during which his interests therein are adequately protected, he is held not to be deprived of his property without due process. Hence a provision that authorizes a court to stay the sale of the security for a reasonable period on condition that the debtor obey the orders of the court, and which requires the debtor to pay a reasonable rental during such period which the court may apply to the payment of taxes and upkeep, does not violate the due process clause.²⁴ An unreasonably long postponement of the creditor's right to apply the security to the satisfaction of his claim would violate his rights under that clause.²⁵ It is also certain that a delay without adequately safeguarding the creditor's interest in the security, or without protecting his rights in the income therefrom during the period of the stay, would be invalid. The creditor may not be compelled to furnish his debtor with capital. The view that he might validly be forced to sacrifice his substantial substantive rights in order to avert a threat to the national welfare has been rejected. The Supreme Court has taken the position that the due process clause prohibits the uncompensated taking of private property for even a public purpose, and that, if the public interest requires and permits the individual mortgagee's interest to be taken to relieve the necessities of the individual mortgagor, resort should be had to the power of eminent domain so that the cost of promoting the public in-

²³ *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 55 S. Ct. 854, 79 L.Ed. 1593, 97 A.L.R. 1106.

²⁴ *Wright v. Vinton Branch of Mountain Trust Bank of Roanoke*, 300 U.S. 440, 57 S.Ct. 556, 81 L.Ed.

736, 112 A.L.R. 1455 (involving amended *Frazier-Lemke Act*).

²⁵ *CONTINENTAL ILLINOIS NAT. BANK & TRUST CO. v. CHICAGO, R. I. & P. RY. CO.*, 294 U.S. 648, 55 S.Ct. 595, 79 L.Ed. 1110, *Black's Cas. Constitutional Law*, 2d, 322.

terest might be spread over the entire community through taxation.²⁶ All of the cases herein considered involved mortgages in existence when the applicable federal legislation was enacted. That legislation was expressly limited to existing mortgages. It is, therefore, undetermined whether such legislation would be valid if made applicable to mortgages subsequently made, and how far the bankruptcy power would enable Congress to limit the extent of rights acquired under state laws either directly or indirectly through changes in the remedies for their enforcement.

State Insolvency Laws

The grant to Congress of the power to enact bankruptcy legislation has not deprived the states of the power to enact and enforce insolvency laws.²⁷ The contract clause of the Constitution prevents a state from making its insolvency law applicable to prior contracts,²⁸ and the due process clause of the Fourteenth Amendment would prevent the discharge of a non-resident creditor who had not been duly made a party to the insolvency proceedings.²⁹ The scope and value of such laws is, therefore, considerably less than that of a federal bankruptcy law. The enactment of a federal bankruptcy act does not annul state insolvency laws, but suspends their operation to the extent that, and as long as, their enforcement would conflict with the federal act or with a Congressional intent that they should be inoperative. The bankruptcy power does not differ in this respect from any other concurrent federal power.

²⁶ *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 55 S. Ct. 854, 79 L.Ed. 1593, 97 A.L.R. 1106.

²⁷ *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L.Ed. 529; *Ogden v. Saunders*, 12 Wheat. 213, 6 L.Ed. 606.

²⁸ *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L.Ed. 529.

²⁹ The principles underlying this position are discussed in *Ogden v. Saunders*, 12 Wheat. 213, 6 L.Ed. 606, in which, however, the decision was not based upon the due process clause of the Fourteenth Amendment, U.S.C.A.Const. Amend. 14, which had not yet become a part of the Constitution.

THE POSTAL POWER

180. The Constitution vests in Congress the power to "establish post-offices and post-roads." It is subject, in exercising this power, to the limitations imposed by the Constitution upon exercises of federal powers generally.

Extent of the Power

The power to establish post-offices and post-roads includes not only the specific activities denoted by those terms, but is the basis for the establishment of the postal system and its operation. It has also been held to authorize the creation of a private railroad corporation to aid in carrying the mails.³⁰ It has never been doubted but that the federal government may monopolize for itself the business of carrying the mails, and Congress has in fact so provided. It is practically certain that Congress may validly protect this governmental monopoly by prohibiting the carriage by others of such mail matter as letters and post-cards which could be legally carried by the governmental system. It has never been decided whether Congress could prohibit private competition with every function that might be undertaken by the government in the exercise of the postal power. The government has, in fact, not attempted to prohibit the express business in order to promote its parcel post system.

The primary function of the postal system is to render certain forms of service. It lies with Congress to determine the extent of that service by determining what shall be carried and what charges shall be exacted for the service.³¹ It may establish classifications in tendering the services, and in that connection condition its grant of the privilege. It has been held that the privileges of second class matter may be denied to those newspapers refusing to publish sworn statements concerning certain matters relating to such newspapers,³² and it has been stated that the privilege of using the mails may be denied for refusal to obey a valid Congressional regulation "pertinent to the use of the mails."³³ The power of determining what shall be

³⁰ *California v. Central Pac. R. R.* Co., 127 U.S. 1, 8 S.Ct. 1073, 32 L.Ed. 150.

³¹ *Ex parte Jackson*, 96 U.S. 727, 24 L.Ed. 877.

³² *Lewis Pub. Co. v. Morgan*, 229 U.S. 288, 33 S.Ct. 867, 57 L.Ed. 1190.

³³ *Electric Bond & Share Co. v. Securities and Exchange Commission*, 303 U.S. 419, 58 S.Ct. 678, 82 L.Ed. 936, 115 A.L.R. 105.

mailable implies that of excluding matter from the mails. Legislation has been sustained that excluded from the mails lottery tickets and related matter,³⁴ obscene matter,³⁵ seditious matter,³⁶ and fraudulent matter.³⁷ The federal government is under no obligation to furnish facilities for the distribution of matter deemed by Congress to be injurious to the public interest. Nor is this power limited to the exclusion of specific matter that in fact belongs within the proscribed classes, but it may extend to the exclusion of matter which there is reasonable ground to believe belongs therein.³⁸ It may also be exercised, at least to some extent, to aid in the enforcement of a policy which Congress is free to adopt in the exercise of its other powers. It has, accordingly, been held valid to deny the use of the mails to public utility holding companies engaged in interstate commerce which refused to register with, and furnish information to, a federal governmental board as a means for the regulation of their activities.³⁹ There are, however, limits on the power of excluding matter from the mails. It may no more be used to invade the reserved powers of the state than may any other federal power. The most recent decision of the Supreme Court recognizes this limit.⁴⁰ However, this limit is likely to prove of little importance in practice in view of the principle that a state's reserved powers are not unconstitutionally invaded merely because the use of the mails is denied in order to strike at evils that Congress could not directly reach.⁴¹ Congress may also resort to its other powers to prevent the transmission by other means of matter that it has excluded from the mails.⁴² It is undetermined how far it could do

³⁴ *Ex parte Jackson*, 96 U.S. 727, 24 L.Ed. 877; *In re Rapier*, 143 U.S. 110, 12 S.Ct. 374, 36 L.Ed. 93.

³⁵ *United States v. Chase*, 135 U.S. 255, 10 S.Ct. 756, 34 L.Ed. 117.

³⁶ *United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson*, 255 U.S. 407, 41 S.Ct. 352, 65 L.Ed. 704.

³⁷ *Public Clearing House v. Coyne*, 194 U.S. 497, 24 S.Ct. 789, 48 L.Ed. 1092; *Badders v. United States*, 240 U.S. 391, 36 S.Ct. 367, 60 L.Ed. 706.

³⁸ *United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burle-*

son, 255 U.S. 407, 41 S.Ct. 352, 65 L.Ed. 704.

³⁹ *Electric Bond & Share Co. v. Securities & Exchange Commission*, 303 U.S. 419, 58 S.Ct. 678, 82 L.Ed. 936, 115 A.L.R. 105.

⁴⁰ *Electric Bond & Share Co. v. Securities & Exchange Commission*, 303 U.S. 419, 58 S.Ct. 678, 82 L.Ed. 936, 115 A.L.R. 105.

⁴¹ *IN RE RAPIER*, 143 U.S. 110, 12 S.Ct. 374, 36 L.Ed. 93, *Black's Cas. Constitutional Law*, 2d, 328.

⁴² *Electric Bond & Share Co. v. Securities & Exchange Commission*,

so where the only basis therefor would be the postal power itself.

Limits on the Power

A constitutional limitation that is often invoked against legislation conditioning the privilege of using the mails, or excluding matter from the mails, is that part of the First Amendment which prohibits Congress from making a law abridging the freedom of the press. The legislation excluding newspapers and periodicals containing advertisements of lotteries, or containing obscene or seditious matter, has been held not to violate this constitutional provision.⁴³ The due process clause of the Fifth Amendment undoubtedly limits Congress in providing for the exclusion of matter from the mails. The mere fact that the use of the mails is a privilege would not permit arbitrary classifications in its grant.⁴⁴ The principal application of the due process clause has been to prevent Congress from conferring arbitrary discretion upon the administrative officers charged with executing the Congressional policy of excluding matter from the mails.⁴⁵ The constitutional provision prohibiting unreasonable searches and seizures⁴⁶ prohibits Congress from authorizing federal officials to invade the secrecy of letters and sealed packages in the mails except by complying with the requirements of that provision.⁴⁷ The foregoing are the constitutional limitations the application of which to the postal power has been judicially considered.

303 U.S. 419, 58 S.Ct. 678, 82 L.Ed. 936, 115 A.L.R. 105.

⁴³ *IN RE RAPIER*, 143 U.S. 110, 12 S.Ct. 374, 36 L.Ed. 93, Black's Cas. Constitutional Law, 2d, 328; *United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson*, 255 U.S. 407, 41 S.Ct. 352, 65 L.Ed. 704.

⁴⁴ See intimation to that effect in

Public Clearing House v. Coyne, 194 U.S. 497, 24 S.Ct. 789, 48 L.Ed. 1092.

⁴⁵ See discussion in *Public Clearing House v. Coyne*, 194 U.S. 497, 24 S.Ct. 789, 48 L.Ed. 1092.

⁴⁶ *Ex parte Jackson*, 96 U.S. 727, 24 L.Ed. 877.

⁴⁷ *Kohl v. United States*, 91 U.S. 367, 23 L.Ed. 449.

FEDERAL TERRITORY AND PROPERTY

181. The United States may acquire foreign territories by cession, conquest, or discovery, as may any other nation. The power to govern them, or to carve out new states therefrom is vested exclusively in Congress. The Congress may also dispose of any other property acquired by the United States in the exercise of any of its delegated powers.

Acquisition of Territory

The Constitution does not expressly confer upon the United States the power of acquiring property or territory additional to that held at the time of the adoption of the Constitution. This has not prevented it from acquiring a considerable additional territory both within and without the continental area of North America. It has acquired territory contiguous to that owned at the time when the additional territory was acquired, and other territory not so situated. The right to acquire property needed in carrying out its general governmental functions by either purchase or by an exercise of the power of eminent domain has been specifically established. The basis for its power to acquire additional territory has been found in several of the Constitution's provisions, such as those conferring upon the federal government the power to declare war and make treaties.⁴⁸ These alone would furnish an adequate basis for the power, but acquisition by the usual methods recognized by international law, such as discovery and occupation, has also been recognized by the Supreme Court.⁴⁹ The usual method by which the United States has added to its territory has been by treaty either with or without war, but congressional action annexing territory would appear to be equally valid.⁵⁰

Government of Acquired Territory

The Constitution expressly empowers Congress to "dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."⁵¹ This provision taken alone is a sufficient basis for the power of Con-

⁴⁸ American Insurance Co. v. Canter, 1 Pet. 511, 7 L.Ed. 242, 243; Stewart v. Kahn, 11 Wall. 493, 20 L.Ed. 176.

⁴⁹ Jones v. United States, 137 U.S. 202, 11 S.Ct. 80, 34 L.Ed. 691.

⁵⁰ Jones v. United States, 137 U.S. 202, 11 S.Ct. 80, 34 L.Ed. 691.

⁵¹ U.S.C.A.Const. Article 4, Section 3, Clause 2.

gress to govern, or provide a government for, any foreign territory acquired by the United States, but it is frequently also implied from the power to acquire territory.⁵² Territory annexed by the United States ceases to be foreign territory immediately upon its annexation. If this is the result of a treaty it becomes domestic territory as soon as the treaty is ratified.⁵³ Federal legislation operates within it from that time on without further Congressional action.⁵⁴ Something more is, however, required before it is deemed a part of the United States within which the entire Constitution operates of its own force. It must become incorporated within the United States by the express or implied assent of Congress thereto.⁵⁵ In the absence of such assent the territory is not incorporated within the United States. All of the provisions of the Constitution operate within an incorporated territory, but only those which are deemed to protect fundamental rights apply to unincorporated territories. These do not include the provision requiring duties and imposts to be uniform throughout the United States,⁵⁶ nor those permitting persons to be held for capital or infamous crimes only upon indictment by a grand jury and to be convicted only by a unanimous verdict of a jury of twelve.⁵⁷ There is no certainty as to what provisions will be held to protect fundamental rights. The power of Congress to govern applies to both incorporated and unincorporated territories from the time of their annexation to the United States. It lies within its sole discretion how it will exercise it. It may legislate for such territory directly, or provide it with an organic law under which a territorial government is established with powers defined therein. An organic law performs for the government of a territory the same function which its own constitution performs for a state. A territory governed by this latter method is generally referred to as an "organized" territory. The ultimate power over such a territory, however, remains with Congress which can assert its power at its sole discretion.⁵⁸

⁵² *Sere v. Pitot*, 6 Cranch 332, 3 L.Ed. 240; *Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U. S. 1, 10 S.Ct. 792, 34 L.Ed. 481.

⁵³ *Cross v. Harrison*, 16 How. 164, 14 L.Ed. 889.

⁵⁴ *DeLima v. Bidwell*, 182 U.S. 1, 21 S.Ct. 743, 45 L.Ed. 1041.

⁵⁵ *Rasmussen v. United States*, 197 U.S. 516, 25 S.Ct. 514, 49 L.Ed. 862.

⁵⁶ *Downes v. Bidwell*, 182 U.S. 244, 21 S.Ct. 770, 45 L.Ed. 1088.

⁵⁷ *Hawaii v. Mankichi*, 190 U.S. 197, 23 S.Ct. 787, 47 L.Ed. 1016; *Dorr v. United States*, 195 U.S. 138, 24 S.Ct. 808, 49 L.Ed. 128, 1 Ann.Cas. 697.

⁵⁸ *First National Bank v. County of Yankton*, 101 U.S. 129, 25 L.Ed. 1046.

The power to carve new states out of any territories acquired by the United States and to admit them to the Union is vested exclusively in Congress.⁵⁹ It is undetermined whether this extends to every part of such territory, including that situated beyond the continental area of the United States. The natural interpretation of the language conferring the power suggests an affirmative answer, and this is reinforced by the fact that the specific limitations imposed on its exercise do not include the one herein suggested. It is also undetermined whether Congress can dispose of territory once annexed by any means whatever, although there is no doubt of the power of the United States to recognize a conquest of part of its territory by a treaty with the power that has conquered it.

Disposition of other Federal Property

The power of Congress to dispose of federal property extends to property of every description. It is the basis for the laws that have been enacted from time to time disposing of the vast public domain acquired in the course of the westward expansion of the nation. The manner in which such property shall be disposed lies with Congress, and it may not only sell such property but lease it as well.⁶⁰ The scope of this power has recently received extensive discussion in a decision sustaining legislation authorizing the sale of surplus power developed at a dam held to have been constructed in the exercise of the war and commerce powers of Congress. The water power developed at such dam is federal property which the federal government may convert into electrical energy which thereby becomes federal property that may be disposed of by Congressional action. The power of Congress is not limited to providing for the disposition of such surplus as is necessarily produced in the course of conducting the activities referable to its war and commerce power under the authority of which the dam was constructed. It may equally dispose of all the surplus power actually developed at such dam which is in excess of the government's needs. It may authorize the acquisition or construction of facilities required to dispose of its property in a suitable market, and may, therefore, acquire transmission lines to carry the electrical energy produced at the dam to such market.⁶¹ The opinion of the Court explicitly as-

⁵⁹ U.S.C.A.Const. Article 4, Section 3, Clause 1.

⁶⁰ United States v. Gratiot, 14 Pet. 526, 10 L.Ed. 573.

⁶¹ Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 56 S.Ct. 466,

80 L.Ed. 688.

sumes that the methods of disposition must be in the public interest and not to promote private ends, and be "consistent with the foundation principles of our dual system of government" and "not contrived to govern the concerns reserved to the states." The basic assumption of the decision is that the electrical energy was acquired by the United States as a result of the valid exercise of a federal power. The opinion of the Court clearly intimates that the power to dispose of federal property confers no authority to acquire property solely for the purpose of disposing of it, but is limited to that which is acquired in the exercise of the federal government's other delegated powers. Although the Court left unanswered the question of the power to authorize the construction or acquisition and operation of local distribution systems within a state, the logical implications of its position would seem to permit this except when used to control matters reserved to the states.

CONTROL OF ALIENS AND NATURALIZATION

182. The United States has exclusive control over the admission of aliens to, and their expulsion from, the territories subject to its jurisdiction.
183. Congress is invested with power to establish a uniform rule of naturalization throughout the United States.

Control of Aliens

The United States, as a sovereign nation, has plenary power to determine the conditions upon which it will admit aliens to any part of the territory subject to its jurisdiction, or to exclude them therefrom.⁶² Its power to deport aliens who are within the United States is equally well established,⁶³ although the requirements of due process limit the procedure in deportation cases more than in exclusion cases. It may, in order to make its policies in these matters effective, punish any person who aids in violating exclusion or deportation statutes.⁶⁴ Its control over

⁶² *Chae Chan Ping v. United States*, 130 U.S. 581, 9 S.Ct. 623, 32 L.Ed. 1068; *Nishimura Ekiu v. United States*, 142 U.S. 651, 12 S.Ct. 336, 35 L.Ed. 1146.

⁶³ *Fong Yue Ting v. United States*, 149 U.S. 698, 13 S.Ct. 1016, 37 L.Ed. 905.

⁶⁴ *Lees v. United States*, 150 U.S. 476, 14 S.Ct. 163, 37 L.Ed. 1150 (sustaining a provision imposing a penalty upon those aiding in the violation of a statute prohibiting importation of contract labor into the United States).

aliens endures as long as they remain such and are within the United States, but it has been held that this does not include the power of regulating all their relations and dealings with citizens.⁶⁵ The power may not be so exercised as to invade the powers reserved to the states. There have not been a sufficient number of decisions to warrant any conclusion as to just how far the federal government will be permitted to go before it will be held to have transgressed this dividing line between the permissible and the prohibited.

Federal Citizenship and Naturalization

Section 1 of the Fourteenth Amendment provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." This provision recognizes that there exist within the United States both a state and federal citizenship. Prior to its adoption a person was generally considered to derive his federal citizenship from his state citizenship except where he had acquired the latter by naturalization under authority of a federal naturalization statute.⁶⁶ This provision modified that relationship to a considerable extent by conferring upon all those upon whom it confers federal citizenship a state citizenship in the state of their residence. They acquire such state citizenship within the meaning of all of those constitutional provisions that condition federal constitutional rights and privileges upon state citizenship. A state is powerless to deny its citizenship to such federal citizens as reside within it, but this provision does not necessarily prevent it from according state citizenship to others. It has not been definitely determined since the adoption of the Fourteenth Amendment how far a state can do so, nor whether a person bearing such a state citizenship would be a citizen of such state within the purport of those constitutional provisions that base federal rights or privileges on state citizenship.

The provision considered in the preceding paragraph recognized two bases of federal citizenship. The first of these is birth

⁶⁵ *KELLER v. UNITED STATES*, 213 U.S. 138, 29 S.Ct. 470, 53 L.Ed. 737, 16 Ann.Cas. 1066, Black's Cas. Constitutional Law, 2d, 330 (holding invalid a statute making it a crime to harbor an alien female for immoral purposes within three years

after her arrival in the United States).

⁶⁶ See discussion in the various opinions in *Dred Scott v. Sandford*, 19 How. 393, 15 L.Ed. 691.

within the United States and subject to its jurisdiction. It is essential that both of these conditions exist in order that a person acquire federal citizenship by birth. It has been stated that the real purpose of the latter requirement was to exclude "children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign state."⁶⁷ A person born within the United States and subject to its jurisdiction acquires federal citizenship even though his parents are aliens, or even aliens incapable under existing statutes of becoming citizens by naturalization.⁶⁸ There are no authoritative decisions determining whether the "United States" in this connection includes any or all of the territories of the United States. It probably would be held to include incorporated, but not to include, unincorporated territories. It would not, of course, include foreign countries. This provision, therefore, does not cover the case of children of American parents born abroad. Congress can determine the matter of their citizenship under its power of establishing a uniform rule of naturalization.⁶⁹

The power of Congress to enact naturalization laws is an exclusive power in the sense that a state has no power to confer federal citizenship upon an alien.⁷⁰ It lies within the exclusive competence of Congress to determine what classes of aliens shall be admitted to citizenship, and the conditions upon which they shall be admitted thereto. It has in fact excluded from the privilege large classes of aliens who are not members of the Caucasian race. It may adopt such method for naturalizing aliens as it chooses and has in general provided a judicial proceeding therefor.⁷¹ Naturalization is usually provided for by general laws but nothing prevents the grant of federal citizenship to named individuals by special act. There may also be collective naturalization when a territory is admitted to statehood, or by treaty in connection with the acquisition of foreign territory. It has been stated that the power of naturalization vested in Con-

⁶⁷ *United States v. Wong Kim Ark*, 169 U.S. 649, 18 S.Ct. 456, 42 L.Ed. 890. The Court also included among those excluded from citizenship on this basis "children of members of the Indian tribes."

⁶⁸ *United States v. Wong Kim Ark*, 169 U.S. 649, 18 S.Ct. 456, 42 L.Ed. 890.

⁶⁹ *United States v. Wong Kim Ark*,

169 U.S. 649, 18 S.Ct. 456, 42 L.Ed. 890.

⁷⁰ *Chirac v. Chirac*, 2 Wheat. 259, 4 L.Ed. 234.

⁷¹ *Holmgren v. United States*, 217 U.S. 509, 30 S.Ct. 588, 54 L.Ed. 861, 19 Ann.Cas. 778 (sustaining a statute authorizing naturalization proceedings in state courts).

gress "is a power to confer citizenship, not a power to take it away."⁷² This, however, does not prevent Congress from providing for the cancellation of certificates of naturalization procured by fraud or in contravention of the naturalization statutes.⁷³ Nor has it prevented Congress from enacting legislation giving express recognition to the citizen's right to expatriate himself with the consent of the sovereign. It has also been held that, since the United States possesses the attributes of a sovereign power, Congress possesses an implied power to attach the legal consequence of expatriation to voluntary acts of even a natural born citizen though the act be perfectly legal and in no sense improper. The Court admitted that Congress possessed no power to impose a loss of citizenship arbitrarily, and that to deprive one of it without his concurrence would be arbitrary. It was also admitted that it would be arbitrary to find that concurrence in a lawful voluntary act having no relation to matters of national importance connected with the international aspects of citizenship. But it was held that a statute under which a native born woman citizen of the United States automatically acquired the citizenship of her husband upon marrying even a resident alien was valid even as applied to a woman who continued to reside within the United States.⁷⁴ It may be noted that this provision of the statutes has been repealed, but this has not affected those who lost their citizenship thereunder while it was in force.⁷⁵

⁷² *United States v. Wong Kim Ark*, 169 U.S. 649, 18 S.Ct. 456, 42 L.Ed. 890.

⁷³ *Johannessen v. United States*, 225 U.S. 227, 32 S.Ct. 613, 56 L.Ed. 1066.

⁷⁴ *Mackenzie v. Hare*, 239 U.S. 299, 36 S.Ct. 106, 60 L.Ed. 297, Ann.Cas. 1916E, 645.

⁷⁵ The text has not undertaken to set forth the existing statutory provisions governing the naturalization of aliens. See the following cases for a discussion of interesting problems thereunder: *United States v. Schwimmer*, 279 U.S. 644, 49 S.Ct. 448, 73 L.Ed. 889; *United States v. Macintosh*, 283 U.S. 605, 51 S.Ct. 570, 75 L.Ed. 1302.

WAR AND MILITARY POWERS

184. The Constitution confers upon Congress not only the power to declare war but also several ancillary powers intended to enable it to prepare for, and prosecute, war. Congress is limited in exercising these powers by the constitutional limitations imposed upon its exercise of its powers generally. The states are expressly prohibited, either absolutely or conditionally, from exercising powers similar to the war and military powers of Congress.

Scope of War Powers

The power to wage war is a national power, and the states are expressly prohibited from engaging in war without the consent of Congress unless either actually invaded or in such "imminent danger thereof as will not admit of delay."⁷⁶ The national power to declare war is vested exclusively in Congress,⁷⁷ although the courts have recognized a power in the President to proclaim the existence of a state of war between different parts of the nation.⁷⁸ The Constitution has also conferred upon Congress the ancillary powers required for preparing for, and waging, war.⁷⁹ These include the powers of raising and supporting armies, providing and maintaining a navy, and providing rules for the government and regulation of the land and naval forces of the United States. It may raise an army or procure personnel for a navy not only by voluntary enlistment but by requiring such services from adults or minors.⁸⁰ Compulsory military or naval service does not violate the provisions of the Thirteenth Amendment prohibiting the existence of involuntary servitude within the United States or in any place subject to its jurisdiction.⁸¹ It merely enforces a duty owed his government by the citizen. It has been held that Congress may validly provide for the enlistment of personnel on such terms as it may deem expedient, and in that connection supersede the parents' control

⁷⁶ U.S.C.A.Const. Article 1, Section 10, Clause 3.

⁷⁷ U.S.C.A.Const. Article 1, Section 8, Clause 11.

⁷⁸ The Prize Cases, 2 Black 635, 17 L.Ed. 459.

⁷⁹ U.S.C.A.Const. Article 1, Section 8, Clauses 12-16.

⁸⁰ SELECTIVE DRAFT LAW CASES, 245 U.S. 366, 38 S.Ct. 159, 62 L.Ed. 349, L.R.A.1918C, 361, Ann. Cas.1918B, 856, Black's Cas. Constitutional Law, 2d, 333.

⁸¹ SELECTIVE DRAFT LAW CASES, 245 U.S. 366, 38 S.Ct. 159, 62 L.Ed. 349, L.R.A.1918C, 361, Ann. Cas.1918B, 856, Black's Cas. Constitutional Law, 2d, 333.

over their minor children and their right to the services of such minor children.⁸² The military forces of the United States may be augmented by organizing, arming, and disciplining the militia. The power to provide for governing such part thereof as is employed in the federal service is vested in Congress, but the appointment of its officers and its training according to the discipline prescribed by Congress is reserved to the states. It may be called forth as provided by Congress only to execute the laws of the Union, suppress insurrections, and repel invasions.⁸³ This limitation does not apply when the militia is drafted into the army, for in that case it may be used for foreign service as may any other part of the army.⁸⁴ It lies within the exclusive power of the President to determine whether the militia shall be called out.⁸⁵ There is a marked difference between the power of Congress to appropriate money for the army and that of appropriating money for the navy. It may make no appropriation for raising or supporting an army for a longer period than two years. There is no such time limit on appropriating funds for the use of the navy.

The Congress also is invested with the power of making rules for the government of the land and naval forces of the United States in both peace and war. This power is expressly made to include the militia while in the service of the United States. The enforcement of these rules and regulations is through a system of courts-martial. There is no doubt of the power of Congress to give such courts exclusive jurisdiction over violations of military laws by members of the military or naval forces. It is undetermined whether it could validly confer upon them jurisdiction over all offences committed by the members of such forces. The precise limits within which they may be given jurisdiction to try those not members of the military or naval forces cannot be definitely defined. They may not be given such powers when the army is merely acting in peace time to aid in enforcing law, nor, in times of war, in areas outside the zone of active military operations in which the civil courts are still functioning.⁸⁶

⁸² *United States v. Williams*, 302 U.S. 46, 58 S.Ct. 81, 82 L.Ed. 39.

⁸⁵ *Martin v. Mott*, 12 Wheat, 19, 6 L.Ed. 537.

⁸³ See *Texas v. White*, 7 Wall. 700, 19 L.Ed. 227.

⁸⁶ See discussion in *Ex parte Milligan*, 4 Wall. 2, 18 L.Ed. 281.

⁸⁴ *Cox v. Wood*, 247 U.S. 3, 38 S.Ct. 421, 62 L.Ed. 947.

Constitutional Limitations on War Powers

The war powers of Congress include not only those already mentioned, but also the enactment of any legislation necessary and proper for the successful prosecution of the war. Statutes prohibiting espionage, the betrayal of military intelligence, and interference with the draft law are within it.⁸⁷ So also are those that provide for the internment of enemy aliens,⁸⁸ and the confiscation of the property of such aliens.⁸⁹ Another war power expressly conferred upon Congress is that of granting letters of marque and reprisal and of making rules concerning captures on land and water.⁹⁰ The Constitution is not, however, suspended during wartime, but the existence of war is the most important factor in determining whether legislation is necessary and proper, or reasonable where validity depends on that element.⁹¹

War Powers Denied to the States

The states are expressly denied not only the power of engaging in war except to repel actual or threatened invasion of their territories, but also many of the specific powers conferred upon the Congress. They may not grant letters of marque and reprisal, nor, without the consent of Congress, keep troops or ships of war in time of peace.⁹² They may, however, exercise their police powers in such manner as to aid the federal government in the prosecution of a war.⁹³

PIRACIES AND VIOLATIONS OF THE LAW OF NATIONS

185. Congress is invested with the power to "define and punish piracies and felonies committed on the high seas, and offenses against the law of nations."⁹⁴

The power conferred upon Congress by this provision is not merely that of punishing piracy as defined by the law of nations,

⁸⁷ *Debs v. United States*, 249 U.S. 211, 39 S.Ct. 252, 63 L.Ed. 566.

⁸⁸ *DeLacey v. United States*, 9 Cir., 249 F. 625, L.R.A.1918E, 1011.

⁸⁹ *Littlejohn & Co. v. United States*, 270 U.S. 215, 46 S.Ct. 244, 70 L.Ed. 553.

⁹⁰ U.S.C.A.Const. Article 1, Section 8, Clause 11.

⁹¹ *Ex parte Milligan*, 4 Wall. 2, 18 L.Ed. 281; *United States v. L. Cohen Grocer Co.*, 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516, 14 A.L.R. 1045.

⁹² U.S.C.A.Const. Article 1, Section 10, Clauses 1 and 3.

⁹³ *Gilbert v. Minnesota*, 254 U.S. 325, 41 S.Ct. 125, 65 L.Ed. 287.

⁹⁴ U.S.C.A.Const. Article 1, Section 8, Clause 10.

but to define it so as to include acts that would not be considered such under that law. It has been held a valid exercise of this power to treat the slave trade as piracy.⁹⁵ The latter part of that provision has been relied on to sustain a statute punishing the counterfeiting, within the United States, of the money or securities of foreign nations.⁹⁶ It would also furnish a basis for neutrality laws and those prohibiting the organization within the country of armed expeditions against friendly nations. The powers conferred by this clause of the Constitution have not, in fact, been frequently exercised.

TREATIES

186. The exclusive control over the nation's foreign relations is vested in the national government. The Constitution provides that the President shall have the power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur. The President also has the power to enter into other forms of international compacts either as the nation's Chief Executive or under authority of law.
187. A treaty made under the authority of the United States is a part of the supreme law of the land which binds the judges in every state notwithstanding anything to the contrary in the laws or constitutions of their respective states.
188. The Congress has the power to enact legislation necessary and proper for carrying into effect the valid provisions of a treaty.
189. While it has been intimated and stated that there are constitutional limits upon the treaty-making power, no treaty provision has ever been held invalid.
190. A treaty is not only a part of the supreme law of the land but also an international agreement.

Treaty-making Power

The conduct of the foreign relations of the people of the United States lies within the exclusive competence of the national government. It covers the entire range of subject-matter customarily belonging in the field of international relations. The primary purpose of those provisions of the Constitution that bear

⁹⁵ United States v. Bates, Fed.Cas. No.14,544.

⁹⁶ United States v. Arjona, 120 U. S. 479, 7 S.Ct. 628, 30 L.Ed. 728.

upon this matter is to define the departments of the national government that shall exercise these powers. Their general conduct is committed to the political departments of that government, and the propriety of their acts in this field are not subject to judicial review.⁹⁷ The President has authority as the nation's Chief Executive to conduct a large part of the nation's foreign affairs. He shares the important treaty-making power with the Senate by virtue of the express constitutional provision that he "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur."⁹⁸ There is no indication herein of the precise division of function between the President and the Senate in the treaty-making process, but in practice the former negotiates them while both he and the requisite majority of the Senate must concur before an agreement made with a foreign nation becomes a treaty.⁹⁹ It is generally conceded that the Senate may amend a proposed treaty submitted to it for its approval. There is, however, no way in which the President can be compelled to accept any amendments made by the Senate.

Treaties as Law of the Land

A treaty is, from the point of view of international law, a contract between the nations that are parties to it. The Constitution furthermore includes treaties "made under the authority of the United States", along with the Constitution and the laws of the United States made in pursuance thereof, as part of the "supreme law of the land", which is expressly made binding upon state judges despite anything in the constitution or laws of their respective states.¹ A term of a treaty dealing with a proper subject of international agreement thus has the same legal force as would a valid exercise of a federal legislative power. If it deals with a subject that could be regulated by Congress in the exercise of any of its powers, the treaty term will supersede prior inconsistent Congressional legislation.² This same principle, however, permits its repeal as a part of the supreme law of the land by a subsequent act of Congress,³ although such re-

⁹⁷ *United States v. Belmont*, 301 U. S. 324, 57 S.Ct. 758, 81 L.Ed. 1134.

⁹⁸ U.S.C.A.Const. Article 2, Section 2, Clause 2.

⁹⁹ *Haver v. Yaker*, 9 Wall. 32, 19 L.Ed. 571; *Shepard v. Northwestern Life Ins. Co.*, C.C., 40 F. 341.

¹ U.S.C.A.Const. Article 6, Clause 2.

² *Foster v. Neilson*, 2 Pet. 253, 7 L.Ed. 415; *Cherokee Tobacco*, 11 Wall. 616, 20 L.Ed. 227.

³ *Head Money Cases*, 112 U.S. 580, 5 S.Ct. 247, 28 L.Ed. 798.

peal may involve a breach of the treaty as an international agreement. There are many matters the regulation of which is reserved to the states under the constitutional distribution of power between nation and state which are also proper matters for international agreement. The right of aliens to acquire and hold property within a state is one such which has frequently been made the subject of treaty arrangements with foreign nations. The treaty provisions in such case supersede state law in conflict therewith, whether such state law be found in the state's constitution, its statutes, or its common law.⁴ It has recently been held a state can have no policy which can limit the treaty-making power of the United States.⁵

Limits on Treaty-making Power

It is an undetermined issue what, if any, are the limits on the treaty-making power of the United States. It is clearly not limited to subject-matter concerning which Congress could legislate under the powers conferred upon it. The cases sustaining treaty provisions that conflicted with state laws governing matters the regulation of which was reserved to the states show this. It has been stated that such limits as exist must be determined in a different way than are those upon the federal government's other powers, but no clue was given as to the principles to be employed in their definition.⁶ The power clearly permits the making of treaties dealing with the customary matters that arise in the intercourse of nation with nation, and also the protection of the national interest with respect to matters in which the states are powerless to act and which involve the interests of other nations.⁷ There are dicta to the effect that a treaty could not authorize what the Constitution forbids, nor authorize a change in the character of the government of the United States or of one of the states, nor cede any portion of the territory of a state without its consent.⁸ The limit first suggested may be ig-

⁴ *Ware v. Hylton*, 3 Dall. 199, 1 L. Ed. 568; *Hauenstein v. Lynham*, 100 U.S. 483, 25 L.Ed. 628; *DeGeofroy v. Riggs*, 133 U.S. 258, 10 S.Ct. 295, 33 L.Ed. 642.

⁵ *United States v. Belmont*, 301 U.S. 324, 57 S.Ct. 758, 81 L.Ed. 1134.

⁶ *MISSOURI v. HOLLAND*, 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641,

11 A.L.R. 984, Black's Cas. Constitutional Law, 2d, 336.

⁷ *MISSOURI v. HOLLAND*, 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641, 111 A.L.R. 984, Black's Cas. Constitutional Law, 2d, 336.

⁸ *DeGeofroy v. Riggs*, 133 U.S. 258, 10 S.Ct. 295, 33 L.Ed. 642; see, as to last part of the statement in the

nored since there is no indication of how to determine what it forbids in connection with the treaty-making power. There is no decision holding invalid any provision of any treaty made "under the authority of the United States." It will probably be long before the question is settled whether the constitutional guarantees may be infringed by exercises of the treaty-making power.

Other International Compacts

Treaties constitute but one form of recognized international agreements. The United States may enter into the other forms as well as into treaties. Making them is not an exercise of the treaty-making power. The President has the power to enter into such agreements in the conduct of the nation's foreign relations, and they do not, as do treaties, require the assent of the Senate.⁹ He may also be authorized to do so by Congressional action. The propriety of the President in making such agreements, or of Congress in authorizing him to do so, is not subject to judicial review.¹⁰ It has also been held that this power may be exercised without regard to state laws or policies, being in this respect similar to the treaty-making power.¹¹ Protocols, postal conventions, commercial agreements, and compacts incidental to the recognition of foreign governments, have been instanced as examples of this type of international agreement.¹²

Legislation in Execution of Treaties

A treaty provision may be self-executing or require legislation to make its terms effective. Congress may, under its power to make all laws which may be necessary and proper to carry into execution the powers vested by the Constitution in the national government, enact legislation to carry out the treaty's provisions. The question has been raised whether Congress could, in that connection, legislate with respect to a subject-matter not within its ordinary legislative powers. The principal case

text, the contrary intimation, where the cession is the result of a disastrous war, in *Downes v. Bidwell*, 182 U.S. 244, 21 S.Ct. 770, 45 L.Ed. 1088.

⁹ *United States v. Belmont*, 301 U.S. 324, 57 S.Ct. 758, 81 L.Ed. 1134.

¹⁰ *United States v. Belmont*, 301 U.S. 324, 57 S.Ct. 758, 81 L.Ed. 1134.

¹¹ *United States v. Belmont*, 301 U.S. 324, 57 S.Ct. 758, 81 L.Ed. 1134.

¹² *United States v. Belmont*, 301 U.S. 324, 57 S.Ct. 758, 81 L.Ed. 1134.

discussing it is that of *Missouri v. Holland*,¹³ which involved the validity of the Migratory Bird Treaty Act, 16 U.S.C.A. §§ 703-711. After several lower federal courts had held that the Migratory Bird Act, regulating the hunting of migratory birds, was not a valid exercise of the commerce power,¹⁴ Congress enacted the Migratory Bird Treaty Act in carrying into execution the terms of a treaty between the United States and Great Britain. The latter Act was sustained even on the assumption that the former had been properly declared invalid.¹⁵ It is quite certain that this power of Congress includes the enactment of any legislation necessary and proper for carrying into execution any valid treaty provision. The limits on that power are, therefore, a function of the limits on the treaty-making power. This power of Congress may well assume a vital role in the expansion of federal legislative powers to include many matters ordinarily deemed reserved to the states.

Limitations on the States

The Constitution specifically prohibits the states from entering into any treaty, alliance or confederation, and from entering into any compact with a foreign power without the consent of Congress.¹⁶ These provisions merely serve to reinforce the exclusive national control over the nation's foreign relations.

¹³ 252 U.S. 416, 40 S.Ct. 382, 64 L. Ed. 641, 11 A.L.R. 984.

¹⁴ *United States v. Shauver*, D.C., 214 F. 154; *United States v. McCullagh*, D.C., 221 F. 288.

¹⁵ *MISSOURI v. HOLLAND*, 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641, 111 A.L.R. 984, Black's Cas. Constitutional Law, 2d, 336.

¹⁶ U.S.C.A.Const. Article 1, Section 10, Clauses 1 and 3.

CHAPTER 11

THE AMENDMENT OF THE FEDERAL CONSTITUTION

- 191. General Considerations.
- 192. The Proposal of Amendments.
- 193-195. The Ratification of Amendments.
- 196-197. Time When Amendments Become Effective.
- 198. Limits on Subject-Matter of Amendments.
- 199. Judicial Review of Validity of Amendments.

GENERAL CONSIDERATIONS

191. The federal Constitution provides for its own amendment by the methods prescribed in Article 5. The process of amending it is an act of fundamental law-making, but is not the exercise of the ordinary legislative powers conferred by the Constitution upon the federal government.

The Constitution of the United States is law, and its amendment is a form of law-making. The process is not an exercise of ordinary legislative power. The power of Congress to participate therein is derived not from the grant to it of the legislative power of the United States but from the specific provisions of Article 5 of the Constitution which prescribes the methods for its amendment. Its exercise of any of the specific functions conferred upon it thereby is not subject to the Presidential power.¹ This does not mean that the scope of its legislative powers is unaffected by the grant to it of power in connection with the amending process. That is among the powers for the effective exercise of which it may make all necessary and proper laws. An example will clarify this matter. Article 5 confers upon Congress the power to determine which of the permissible methods of ratification shall be followed. Its action in making this decision is an exercise of a power derived from that Article. The effective execution of the method of ratification by conventions in the states might well be promoted by a system of federally prescribed rules governing the entire process. The act of Congress in prescribing it would undoubtedly be held an exercise of the legislative powers conferred upon it by Article 1 of the Constitution. There are no decisions on this matter since Congress has never enact-

¹ *Hollingsworth v. Virginia*, 3 Dall. 378, 381, 1 L.Ed. 644.

ed such a system. This is, however, but one of the many problems concerning the amendment of the federal Constitution to which a definitive answer, based on judicial decision, cannot be given.

THE PROPOSAL OF AMENDMENTS

192. Amendments to the federal Constitution may be proposed either by Congress or by a convention called by Congress for that purpose.

Article 5 of the Constitution contains its only provisions prescribing how it may be amended. The amending process consists of two distinct parts: proposal and ratification. The methods for proposing amendments are the same regardless of their subject-matter. They may be proposed by Congress on its own initiative whenever two-thirds of both houses shall deem it necessary, or by a convention called for that purpose which Congress is required to call on application of the legislatures of two-thirds of the states. The latter method has never yet been resorted to, and questions of the construction of the part of Article 5 dealing therewith have therefore never been judicially determined. The Supreme Court has settled several important questions concerning the first of those methods. The joint resolution proposing an amendment need not expressly state that it is deemed necessary by two-thirds of both houses, since its submission sufficiently indicates that fact.² The two-thirds vote of each house required for its submission means a two-thirds vote of those present, assuming that a quorum is present, and not a two-thirds vote of the entire membership of each house.³ Any irregularity or insufficiency in the action of Congress in proposing an amendment cannot be attacked in the courts on that ground in advance of its adoption (as, for instance, by an action to enjoin the governor of a state from submitting it to the state legislature), but only after its promulgation and when it is sought to put it into effect.⁴

² *Rhode Island v. Palmer*, 253 U. S. 350, 40 S.Ct. 486, 64 L.Ed. 946.

⁴ *State of Ohio ex rel. Erkenbrecher v. Cox*, D.C., 257 F. 334.

³ *Rhode Island v. Palmer*, 253 U. S. 350, 40 S.Ct. 486, 64 L.Ed. 946.

THE RATIFICATION OF AMENDMENTS

193. Amendments, however proposed, can become a part of the Constitution only if ratified either by the legislatures of three-fourths of the several states or by conventions in three-fourths thereof.
194. Congress has the exclusive power to determine by which of these two methods ratification shall be effected.
195. An amendment, the effect of which would be to deprive any state of its equal suffrage in the Senate, must, in addition to complying with the other requirements for ratification, be ratified by such state.

Methods of Ratification

The provisions of Article 5 governing ratification have received a more extensive judicial construction. Ratification is an act by which the people of the United States assent to the proposed amendment. Two methods are provided for with respect to all proposals except those whose effect, if ratified, would be to deprive any of the states of its equal suffrage in the Senate. Those methods are ratification by the legislatures of three-fourths of the several states or by conventions in three-fourths thereof, "as the one or the other mode of ratification may be proposed by Congress." The former of these methods has been used in every case except that of the Twenty-first Amendment which repealed the Eighteenth Amendment. The language of Article 5 would seem sufficiently clear that the choice of method lay wholly within the discretion of Congress. The Eighteenth Amendment, however, was assailed on the score that the Constitution required its ratification by the convention method. The theory urged in support of this position was that any proposed amendment conferring upon the federal government "new direct powers over individuals" had to be ratified in conventions in the requisite number of states, and that the Eighteenth Amendment was of that character. The power of Congress to select the method was claimed to apply to only such proposals as involved a change in the machinery of the federal government, but not to such as directly affected the liberty of the citizen. It was urged that the Constitution impliedly required this because its framers had required the Constitution to be ratified by conventions in the several states, as the legislatures were deemed incompetent to surrender the liberties of the people to the new government to be established by the Constitution. The Tenth

Amendment, reserving to the states, or to the people the powers not delegated to the federal government, was alleged to have removed whatever doubt there may once have existed on this matter under the original Constitution. Although these theories were rejected by the trial court, it developed a wholly new theory of its own in holding the Amendment to be void because it had not been ratified by the convention method. Its theory was a strange mixture of "political science" and "a scientific approach to the problem of government."⁵ The Supreme Court made short shrift of both of the foregoing theories, and held unequivocally that the choice of the method of ratification lay "solely in the discretion of Congress."⁶

State Imposed Limitations on the Process of Ratification

It has never been doubted that Congress, or a convention called by it therefor, exercises a national function in proposing amendments to the Constitution. It is equally well established that the power to ratify a proposed amendment has its source in the federal Constitution, and that state legislatures or conventions perform a federal function in exercising that power.⁷ The people of the several states are powerless to limit them in their performance of that function.⁸ They may not by their respective constitutions deprive them of those powers which have been conferred upon them by Article 5 of the Constitution, nor may those legislatures or conventions delegate their powers to any extent. The question has arisen whether the state legislature which may be chosen by Congress to ratify a proposed amendment means the formal legislative body of elected representatives or the body in which the state has, under its constitution, vested its ultimate legislative power. It was decided that the term, as used in Article 5, denoted the former.⁹ A state constitutional provision for

⁵ *United States v. Sprague, D.C.*, 44 F.2d 967.

⁶ *UNITED STATES v. SPRAGUE*, 282 U.S. 716, 51 S.Ct. 220, 75 L.Ed. 640, 71 A.L.R. 1381, *Black's Cas. Constitutional Law*, 2d, 348. The suggestion that an amendment might be validated by acquiescence over a long period of time was rejected in *LESER v. GARNETT*, 258 U.S. 130, 42 S.Ct. 217, 66 L.Ed. 505, *Black's Cas. Constitutional Law*, 2d, 352.

⁷ *HAWKE v. SMITH*, 253 U.S. 221, 40 S.Ct. 495, 64 L.Ed. 871, 10 A.L.R. 1504, *Black's Cas. Constitutional Law*, 2d, 341; *LESER v. GARNETT*, 258 U.S. 130, 42 S.Ct. 217, 66 L.Ed. 505, *Black's Cas. Constitutional Law*, 2d, 352.

⁸ *LESER v. GARNETT*, 258 U.S. 130, 42 S.Ct. 217, 66 L.Ed. 505, *Black's Cas. Constitutional Law*, 2d, 352.

⁹ *HAWKE v. SMITH*, 253 U.S. 221, 40 S.Ct. 495, 64 L.Ed. 871, 10 A.L.R.

referring the action of its legislature in ratifying a proposed amendment to the federal Constitution to a popular vote is, therefore, violative of Article 5, since it is an attempt to give the final decision on that matter to a body other than that upon which that Article has conferred it. A ratification by the legislature is, therefore, valid and effective even though subsequently rejected by a popular referendum thereon.¹⁰ The same theory would render invalid and ineffective a ratification by a popular vote. It is also practically certain that a state constitutional provision that the legislature should be bound by the results of a popular referendum on the ratification of a proposed amendment would be invalid, and that a legislative ratification following its rejection by such referendum would be valid and effective. The same principles that render invalid state constitutional provisions subjecting to a popular referendum the action of the legislature in passing on the ratification of a proposed amendment to the federal Constitution would render invalid any other attempts to fetter its action thereon. The referendum issue is the only one on which the Supreme Court has thus far decided, but its language is sweeping that the exercise by a state legislature of this function "transcends any limitation sought to be imposed by the people of the state."¹¹ The function of state ratifying conventions is of the same constitutional character as is that of the state legislatures in ratifying proposed amendments. It would, therefore, follow that the people of a state would be powerless to limit their exercise of their federal function either by constitutional provision or by legislation. A statute requiring the elected members of such conventions to in effect abide by the results of a popular vote on the issue, or that in effect deprives the convention of its power to exercise an unfettered discretion in passing thereon, would seem to be invalid. There is, however, a marked difference of opinion on that matter.¹² It has been held that the enactment by a state legislature of a statute providing the machinery for

1504, Black's Cas. Constitutional Law, 2d, 341.

¹⁰ HAWKE v. SMITH, 253 U.S. 221, 40 S.Ct. 495, 64 L.Ed. 871, 10 A.L.R. 1504, Black's Cas. Constitutional Law, 2d, 341.

¹¹ LESER v. GARNETT, 258 U.S. 130, 42 S.Ct. 217, 66 L.Ed. 505, Black's Cas. Constitutional Law, 2d, 352. For a discussion of other state constitutional restrictions on the

power of the legislature to ratify proposed amendments to the federal Constitution see *Leser v. Board of Registry*, 139 Md. 46, 114 A. 840, affirmed in case first cited.

¹² See for discussion of the opposing views on these matters *In re Opinions of the Justices*, 226 Ala. 565, 148 So. 107, and *In re Opinion of the Justices*, 132 Me. 491, 167 A. 176.

the election of the members of a convention to ratify a proposed amendment to the federal Constitution, and for conducting such convention, is the performance of a federal function resting on the authority of Article 5, and that such enactment cannot validly be subjected to the referendum provision of the state's constitution.¹³ This position appears somewhat extreme.¹⁴ The power of Congress to select ratification by conventions is undoubtedly one that can be made effective by ordinary Congressional legislation providing complete machinery for its execution. No attempt has ever been made to do so. Congress would undoubtedly be without power to limit the powers of such conventions in such manner as to deprive them of final discretion as to their decision on the issue of ratification.

Limits on Period During which Ratification Must Occur

Article 5 is silent on whether there is any limit on the time during which a state legislature or convention has the power to ratify proposed amendments. There has been no case in which an amendment that had been ratified in the requisite number of states has been held invalid for any reason, and consequently none in which one has been held invalid because of the time elapsed between the time of its submission and its ratification by the last state required to make its ratification effective. The Supreme Court has, however, definitely stated that Article 5 fairly implies that ratification must be "within some reasonable time after the proposal." The inference was derived from the facts (1) that proposal and ratification are steps in a single process, (2) that, since amendments may be proposed only when deemed necessary, it was to be implied that they were to be presently disposed of, and (3) that, since ratification is but the expression of the people's assent, it was fair to infer that it must be sufficiently contemporaneous in the required number of states to reflect the will of the people in all sections at relatively the same period.¹⁵ The Court was somewhat influenced by the absurd consequences that a contrary view would have involved in view of outstanding proposals dating back more than half a century. It had in mind the problem of the maximum period after which

¹³ State ex rel. Donnelly v. Myers, 127 Ohio St. 104, 186 N.E. 918; State ex rel. Tate v. Sevier, 333 Mo. 662, 62 S.W.2d 895, 87 A.L.R. 1315.

¹⁵ DILLON v. GLOSS, 256 U.S. 368, 41 S.Ct. 510, 65 L.Ed. 994, Black's Cas. Constitutional Law, 2d, 344.

¹⁴ See dissenting opinion in case first cited in footnote 13.

ratification would be a nullity. It did not assume to define what would constitute a reasonable period, but its theory thereon is fairly implicit in the reasoning employed to discover the existence of any limit whatever. It was decided in the same case in which the foregoing doctrine was enunciated that the power of Congress to designate the mode of ratification included that of fixing a definite period for ratification. Its power, however, is to fix a reasonable period only. The seven year period fixed by it for the ratification of the Eighteenth Amendment was said to be clearly reasonable in view of the periods within which prior amendments had been ratified.¹⁶ There is no doubt but that the requirement that a period fixed by Congress be reasonable will prevent it from fixing too brief a period as well as one that is excessively long. The doctrine of the implied limit based on the provisions of Article 5 is available only to prevent an unduly long period from intervening between the submission of a proposed amendment and its ratification by the requisite number of states.¹⁷

A theory has recently been advanced by a state court that the power of any state to ratify ceases whenever the proposed amendment has been rejected by one more than one-fourth of the states.¹⁸ It was enunciated in a case in which it was held that a state may act but once on any proposed amendment, and that its rejection is as final as its ratification would be. It is a valid deduction from that position that the rejection by one more than one-fourth of the states would prevent the ultimate effective ratification of the proposed amendment, and that any subsequent action by any of the other states would be a wholly futile gesture.

¹⁶ This was the first instance in which a time limit was fixed for ratification of a proposed amendment.

¹⁷ It has been held in a state case that the lapse of more than a reasonable time after its submission prevented a state from ratifying the proposed Child Labor Amendment; it had been submitted in 1924 and the purported ratification occurred in 1937; Congress had fixed no period for its ratification; *Wise v. Chandler*, 270 Ky. 1, 108 S.W.2d 1024. A contrary decision was reached in another state decision involving the same proposal, the court tak-

ing the position that the proposal still had relation to the sentiments and felt needs at the time of its ratification; *Coleman v. Miller*, 146 Kan. 390, 71 P.2d 518. Quere as to the effect upon this issue of the fact that there was an intervening period during which the proposal had no relation to the then prevailing sentiments and felt needs, where the total period between the submission and purported ratification would be unreasonably long by any ordinary standard?

¹⁸ *Wise v. Chandler*, 270 Ky. 1, 108 S.W.2d 1024.

It would not then be unreasonable to imply from Article 5 that the period of ratification had been thus terminated. The court supported its view by treating the submission of a proposed amendment as an offer which would be terminated by the rejection of one more than one-fourth of the states since its effective acceptance would thereby be rendered legally impossible. The validity of its position depends entirely upon the correctness of its basic premise that a rejection is final. This is at least a sufficiently debatable matter to cast serious doubts upon the soundness of this theory.

Finality of Rejection or Ratification

There has been much speculation on the power of a state legislature to reverse its action on a proposed amendment submitted to it. The Supreme Court has never passed on the question whether such power exists. It has recently been decided for one possible case thereof by the courts of two states which reached opposite conclusions thereon. Both cases involved the proposed Child Labor Amendment submitted in 1924. The legislatures of each of the states had rejected it within two years of its submission, and ratified it during 1937. The supreme court of Kansas held that, while ratification is final, the rejection of a proposed amendment has no such finality, and that the act of the state legislature in ratifying the proposal was valid.¹⁹ The highest court of Kentucky, on the other hand, held that a state can act but once on a proposed amendment, whether it acts thereon by its legislature or by a convention, and that, since the state had exhausted its power when it originally rejected the proposal, its subsequent ratification was void.²⁰ It supported its position with many specific arguments. It argued from the premise that ratification by convention would be final to the conclusion that ratification by the legislature would be equally so; and from that conclusion, taken as a new premise, it derived the further conclusion that rejection of a proposal was final. It correctly rejected the contention that one legislature could not bind another by denying that action on a proposed amendment is legislation. But it would not follow from the incorrectness of that contention that Article 5 did not intend to permit one legislature to reverse the action of a prior legislature in performing the federal function of passing on a proposed amendment as long as the proposed amendment has not yet been completely

¹⁹ *Coleman v. Miller*, 146 Kan. 390, 71 P.2d 518.

²⁰ *Wise v. Chandler*, 270 Ky. 1, 108 S.W.2d 1024.

ratified or during the reasonable period during which the opportunity to ratify the proposed amendment continues. The position of this court will probably be held incorrect if the issue is ever passed upon by the Supreme Court.

The other possible case involving a state's power to reverse its action is that in which it rejects a proposed amendment after having first ratified it. Its power to withdraw a prior ratification, if it possesses it at all, would cease as soon as the last state necessary for its final ratification had ratified it. The proposal would become a part of the Constitution from that moment removable therefrom only by the process of amendment in accordance with Article 5. The only question is whether a state may recall its prior ratification at any time before the proposal has become incorporated in the Constitution. It was stated in one of the cases cited in the preceding paragraph, and assumed and implied in the other, that ratification is final and irrevocable. There is no more reason for holding it such than there is in the case of a rejection of a proposed amendment. The act of any single state in ratifying has no affirmative effect upon the constitutional status of the proposal until combined with the similar act of one less than the number required for changing its status from a mere proposal to a part of the Constitution. The answer to the problem is, however, unlikely to be deduced from purely theoretical considerations. Permitting withdrawal of a prior ratification as long as the proposal has not been completely adopted seems more consonant with the political theories underlying our governmental system, and fairer if prior rejections are permitted to be set aside by later ratifications. It is unlikely that the power of a state to reverse its prior action on a proposed amendment will be any less when ratification is required to be by conventions rather than by the legislatures in the several states. If it is ultimately held that a state possesses this power, it is almost certain to be held that Congress would be powerless to deprive it thereof by any legislation that it might be permitted to enact in implementing the method of ratification by conventions.

Special Method of Ratification

Article 5 provides that no state shall be deprived of its equal suffrage in the Senate without its consent. This is not a limit on the subject-matter of an amendment but on the method by which a proposal with a particular subject-matter must be ratified. It was intended to prevent the impairment of one of the

compromises of the Constitution by the amending process. The states whose consent is required are those whose representation in the Senate the proposed amendment would leave below that to which they would be entitled under the constitutional rule of equality of suffrage therein. There are many ways in which this might be accomplished. It might be effected by reducing the representation of some states which would then be the states whose consent to the change was required. It might be effected by increasing the representation of some states, and this would require the consent of all those whose representation was left unchanged. It might be brought about by increasing the representation of some state by more than that by which that of the others was increased. The consent of the latter would then be required. It might also be produced by any combination of these devices. Whatever the method, the consent of all the states which were accorded a lesser representation than that which any other state was accorded, or would have if the proposal were adopted, is necessary to bring it about. It is inconceivable that assent would be required from those states which would, under the proposal, be given a representation greater than that accorded any other state thereby, although a construction of the language of the provision requiring their assent is a logical possibility. Proposed amendments whose effect would be to deprive any state of its equal suffrage in the Senate do not, therefore, need to be ratified by all the states. They are like any other proposed amendment so far as they must be ratified by at least three-fourths of the states. Ratification by such three-fourths of them is sufficient if all of those whose assent is required under the principles stated above are included in that group. The method of ratification that applies in the case of other proposals is modified only by imposing one additional condition, viz., ratification by all the states which would be deprived of the constitutional equality of suffrage in the Senate if the proposal were adopted as part of the Constitution. It is unlikely that a judicial determination of these issues will ever have to be made.²¹

²¹ Quere whether a state which has once assented to accept inferior numerical representation in the Sen-

ate could thereafter have its numerical inequality increased without its consent?

TIME WHEN AMENDMENTS BECOME EFFECTIVE

196. An amendment, other than one requiring ratification by a state which is being deprived thereby of its equal suffrage in the Senate, becomes operative as a part of the Constitution as soon as ratified by the necessary three-fourths of the states.
197. An amendment that deprives any state of its equal suffrage in the Senate becomes operative as a part of the Constitution as soon as both of the conditions required for its ratification are complied with.

The Secretary of State of the United States is required by federal statute²² to issue his proclamation that an amendment has been adopted on receipt of official notices from the required number of states certifying to the ratification of the proposal by their respective legislatures or by conventions held in their respective states, as the case may be. The amendment becomes effective as a part of the Constitution from the date of its ratification by the last of the necessary three-fourths of the states, not from the time of its promulgation by the Secretary of State.²³ It may happen, as in the case of the Eighteenth Amendment, that the rule of constitutional law contained in an amendment becomes operative at a subsequent date specified in the amendment. This does not, however, defer the time when the amendment becomes a part of the Constitution.

LIMITS ON SUBJECT-MATTER OF AMENDMENTS

198. There is no longer any express limit on the permissible subject-matter of amendments, and there never have existed any implied limits thereon.

It has at times been contended that the power to amend the Constitution does not extend to all subjects, but that there are implied limits thereon. The Eighteenth Amendment was claimed

²² Revised Statutes of the United States, Sec. 205.

²³ DILLON v. GLOSS, 256 U.S. 368, 41 S.Ct. 510, 65 L.Ed. 994, Black's Cas. Constitutional Law, 2d, 344. It has been stated by way of dictum that a statute enacted by

Congress to take effect upon the ratification of a proposed amendment already submitted would be valid though Congress would have no power to enact it but for the ratification of such proposal; Druggan v. Anderson, 269 U.S. 36, 46 S.Ct. 14, 70 L.Ed. 151.

to have exceeded those limits because it infringed upon the police powers of the states and sought to regulate their internal affairs. The Nineteenth Amendment (prohibiting the denial or abridgement of the right to vote on account of sex) was alleged to exceed the valid range of the amending power because the resulting addition to the electorate of a state without its assent would destroy its autonomy as a political body. Attempts have been made to derive a limit on the permissible subject-matter from a definition of "amendment" so as to exclude that which should be reserved for ordinary legislation. None of these claims have received any judicial support. The Supreme Court has rejected every such contention presented to it. It has held that every amendment, the validity of which was being questioned on these grounds, was within the amending power. It has not, however, ever decided or stated that there are no implied limits on the amending power. It is a practical certainty that, if it ever passes on that question, it will hold that there are no such implied limits upon that power. That would be the only holding consistent with the ultimate political theory on which our constitutional system is based. The people, acting through the machinery provided by the existing Constitution, must be accorded the legal power to change their basic law by peaceable means.²⁴ There are no longer any express limits on the amending power. The only such limit has long been obsolete.

JUDICIAL REVIEW OF VALIDITY OF AMENDMENTS

199. The courts will determine the validity of an amendment to the federal Constitution if necessary to the decision of a case properly before them.

The question of whether an amendment has been validly adopted and become a part of the Constitution is as much a judicial question as is the interpretation of any part of the Constitution. A court may, however, determine this issue only as an incident to the decision of a case properly before it. The existence of a

²⁴ See arguments of counsel and the opinions of the Court in *Rhode Island v. Palmer*, 253 U.S. 350, 40 S.Ct. 486, 64 L.Ed. 946, and *LESER v. GARNETT*, 258 U.S. 130, 42 S.Ct. 217, 66 L.Ed. 505, *Black's Cas. Constitutional Law*, 2d, 352. It has been held in one state case that the

power of amending the state constitution was subject to the implied limit that its subject-matter must not be "legislative" in character; *State ex rel. Halliburton v. Roach*, 230 Mo. 408, 130 S.W. 689, 139 Am. St.Rep. 639. Its position is indefensible.

case, and the right of a party to raise this issue, are determined by the same principles as govern the same matters in connection with the judicial decision of other constitutional issues. The general right possessed by every citizen to have the federal government administered according to law, and to prevent the waste of public moneys, does not entitle him, however, to sue in order to secure by indirection a determination whether a constitutional amendment about to be adopted would be valid.²⁵ A person whose interests of person or property have been injured, or are threatened with injury, from the enforcement of legislation, the validity of which depends upon the validity of a constitutional amendment, may raise the issue in a proceeding to which he is a party. A court will not, however, make an independent inquiry to determine whether all the facts exist on whose existence the validity of an amendment to the federal Constitution depends, nor reach an independent conclusion thereon. The ultimate fact is the ratification by the requisite number of states. If the legislature of a state had the power to adopt a ratifying resolution (as it would have in any case in which Congress has provided for ratification by the legislatures of the several states), official notice to the Secretary of State, duly authenticated, that it has ratified a proposed amendment is conclusive upon him, and his certification thereto by his proclamation is conclusive upon the courts.²⁶ It should be noted that the conclusive effect of the official notice to, and the certification thereof by, the Secretary is based on certain assumptions. How far a court would reach its own independent conclusion on the matters thus assumed cannot be definitely stated.

²⁵ *Fairchild v. Hughes*, 258 U.S. 130, 42 S.Ct. 217, 66 L.Ed. 505, 126, 42 S.Ct. 274, 66 L.Ed. 499. Black's Cas. Constitutional Law, 2d,

²⁶ *LESER v. GARNETT*, 258 U.S. 352.

CHAPTER 12

THE FEDERAL EXECUTIVE

- 200. The President and Vice-President.
- 201. Military Powers of the President.
- 202. Pardon Power of the President.
- 203-205. President's Relations with Congress.
- 206-208. President's Power in Foreign Relations.
- 209-212. Appointment and Removal of Officers.
- 213. Executive Powers of the President.
- 214. Impeachments.

THE PRESIDENT AND VICE-PRESIDENT

- 200. The Constitution vests the executive power of the United States in a President, who holds his office for a term of four years, and whose qualifications and the manner of whose election, are prescribed by it. It also provides for the election of a Vice-President.

Qualifications of President and Vice-President

The federal executive power is vested by the Constitution in the President.¹ A person must, to be eligible for that office, be a natural born citizen of the United States, have attained the age of 35 years, and have been for 14 years a resident within the United States.² The requisite period of residence need not be a continuous period of 14 years immediately preceding a person's election to the Presidency. The Constitution also creates the office of Vice-president.³ It did not originally prescribe any qualifications for that office, but this was changed by the Twelfth Amendment which provides that "no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President."

Manner of Election of President and Vice-President

The President and Vice-President are not elected by the people directly but by the members of an electoral college. Each

¹ U.S.C.A.Const. Article 2, Section 1, Clause 1.

³ U.S.C.A.Const. Article 2, Section 1, Clause 1.

² U.S.C.A.Const. Article 2, Section 1, Clause 5.

state is entitled to appoint a number of electors equal to the number of its Senators and Representatives to which it is entitled in Congress. Senators, Representatives, and persons holding an office of trust or profit under the United States are expressly disqualified from being appointed as electors.⁴ The manner of appointment of its electors is by the express terms of the Constitution left to the legislature of each of the states.⁵ It may provide for their appointment by the legislature itself, by a popular vote in districts, or by a popular vote throughout the state at large.⁶ The first of these prevailed in many states over a long term of years, but the last of them is now almost universally in use. It is fairly arguable that a state could not deprive its legislature of the power to determine the method for appointing electors by a provision in its own constitution. The only power vested in Congress over the appointment of electors is that of determining the time of choosing them.⁷

The process by which the electors choose a President and a Vice-President of the United States is now governed by the Twelfth Amendment which in 1804 replaced that originally provided for. The electors of each state meet therein and vote separately for a President and a Vice-President, one of whom, at least, must be an inhabitant of another state.⁸ Their signed and certified ballots are sealed and transmitted to the seat of the federal government, directed to the President of the Senate who is required to open the certificates in the presence of both the Senate and the House of Representatives. The votes are then counted, but the Constitution is silent as to who shall count them. This matter is regulated by statute. The person receiving the greatest number of votes for President shall be President if his vote is a majority of the whole number of electors appointed. The House of Representatives elects a President if such number be not a majority of the total number of electors appointed. It must elect him from those persons, not in excess of three, having the highest number of votes. The election is required to be by ballot, the vote is taken by states with each state entitled to

⁴ U.S.C.A.Const. Article 2, Section 1, Clause 2.

⁵ U.S.C.A.Const. Article 2, Section 1, Clause 2.

⁶ *McPherson v. Blacker*, 146 U.S. 1, 13 S.Ct. 3, 36 L.Ed. 869.

⁷ U.S.C.A.Const. Article 2, Section 1, Clause 4.

⁸ By U.S.C.A.Const. Article 2, Section 1, Clause 4, Congress is empowered to determine the day on which they shall give their votes, which day is required to be uniform throughout the United States.

one vote, and a majority of all the states is necessary to an election. The person receiving the highest vote for Vice-President shall be the Vice-President if his vote is a majority of the total number of electors appointed. If no one receives such a majority the Senate chooses the Vice-President from the two candidates receiving the highest number of votes, and a majority of the whole number of Senators is necessary for an election. By the Twentieth Amendment the Vice-President elect acts as President until a President shall have qualified if no President has been chosen before the time fixed for the beginning of his term or if the President elect has failed to qualify before such time. It also empowers Congress to provide by law for the case in which neither the President elect nor the Vice-President elect has qualified. The power of Congress is, however, limited to enacting a law either declaring who shall act as President, or prescribing the manner in which a person who is to act as such shall be elected. The person so determined acts as President until either a President or Vice-President shall have qualified. This Amendment opens an avenue for avoiding the embarrassment that might have arisen prior thereto in case of a "deadlock" in the House in choosing a President when the electoral college had failed to do so. The original design of the framers of the Constitution was to interpose the electoral college between the voters and the Presidency. This design has been effectually frustrated by the development of our political institutions. The electoral college still possesses the legal power to choose whomsoever it wishes for President and Vice-President. In practise it performs the merely perfunctory task of registering the votes of its members for the candidates nominated by the political party by which its members were chosen. It is now a mere survival.

Presidential Succession

The original Constitution provided that the office of President should devolve upon the Vice-President "in case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of said office." It also conferred upon the Congress the power to provide by law for the case of the "removal, death, resignation, or inability" of both the President and Vice-President. It is in such case empowered to declare "what officer shall then act as President." The officer so designated shall act as President "until the dis-

ability be removed, or a President shall be elected.”⁹ The statute presently governing that matter was enacted in 1886, under which the heads of the executive departments succeed to the office of the Presidency in a prescribed order beginning with the Secretary of State. No method was originally established for selecting a person to act as President where the office became vacant because of the failure to elect a President prior to the time fixed for the beginning of his term, or because of his failure to qualify before said time. This matter is now provided for by the Twentieth Amendment which has already been discussed.

Terms of President and Vice-President

The terms of office of both the President and the Vice-President are four years.¹⁰ Since the recent adoption of the Twentieth Amendment their terms begin at noon on the 20th day of January.

Compensation of President

The Constitution provides that the “President shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected.”¹¹ He is also prohibited by the same provision from receiving “during the same period any other emolument from the United States, or any of them.” Subjecting his salary to a federal income tax would violate the provision against its diminution.¹²

MILITARY POWERS OF THE PRESIDENT

201. The Constitution provides that the “President shall be commander in chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States.”¹³

This power of the President is wholly distinct from that of Congress to raise and support armies, to provide and maintain a navy, and to make rules for their government. Neither has

⁹ U.S.C.A.Const. Article 2, Section 1, Clause 6.

¹⁰ U.S.C.A.Const. Article 2, Section 1, Clause 1.

¹¹ U.S.C.A.Const. Article 2, Section 1, Clause 7.

¹² See *Evans v. Gore*, 253 U.S. 245, 40 S.Ct. 550, 64 L.Ed. 887, 11 A.L.R. 519.

¹³ U.S.C.A.Const. Article 2, Section 2, Clause 1.

the President any power to declare war, although he may recognize the existence of a state of war, and employ the military and naval forces against the enemy, even before Congress has actually declared war.¹⁴ The President, however, possesses complete power to direct the military and naval forces in time of war. His actions in that connection are not subject to judicial control. He may, as such commander in chief, establish military governments in occupied enemy territory during the war. This applies not only to the case in which the enemy is a foreign nation, but also to that of a domestic enemy during a civil war.¹⁵ This power of the President ceases upon the termination of the war, although he may still continue to govern such territory through such a government after the termination of the war if it has become a part of the territory of the United States. He governs it in such case not as the commander in chief of the occupying military forces, but in his capacity as the nation's chief executive and only until Congress has provided another government therefor.¹⁶ The President may not set up military governments in such part of the domestic territory of the United States as is not in rebellion against it. The existence of war does not even justify the military authorities in trying the civilian population of such domestic territory by court martial if the civil courts therein are open and functioning.¹⁷ The power to declare martial law as an aid in enforcing federal laws is not a part of the President's military power but is an incident to his civil power to enforce those laws.

PARDON POWER OF THE PRESIDENT

202. The power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment, is vested by the Constitution in the President.¹⁸

The principal questions that have arisen in connection with the President's pardoning power have involved its extent as

¹⁴ The Prize Cases, 2 Black 635, 17 L.Ed. 459.

¹⁵ Dooley v. United States, 182 U. S. 222, 21 S.Ct. 762, 45 L.Ed. 1074 (foreign territory). New Orleans v. New York Mail Steamship Co., 20 Wall. 387, 22 L.Ed. 354 (domestic enemy territory).

¹⁶ See discussions in Texas v.

White, 7 Wall. 700, 19 L.Ed. 227; Cross v. Harrison, 16 How. 164, 14 L. Ed. 889, and Dooley v. U. S., 182 U. S. 222, 21 S.Ct. 762, 45 L.Ed. 1074.

¹⁷ Ex parte Milligan, 4 Wall. 2, 18 L.Ed. 281.

¹⁸ U.S.C.A. Const. Article 2, Section 2, Clause 1.

limited by the doctrine of the separation of power. It is a power that may not be controlled by Congress which can neither limit the effect of a pardon nor exclude any class of offenses against the United States from its exercise.¹⁹ Amnesty acts have, however, been held not to constitute an interference with this power.²⁰ The power extends not only to crimes and misdemeanors defined as such by congressional legislation, but to every offense known to the law. The President may, therefore, pardon criminal contempts of the courts of the United States, and doing so has been held not to constitute an unconstitutional interference with the judicial department of the government.²¹ The Supreme Court has been largely influenced by historical arguments in defining the meaning of the phrase "offenses against the United States," and has stated that its purpose was to exclude from the scope of the President's power offenses against a state.²² The pardon power includes not only that of granting absolute and unconditional pardons, but also that of commuting a punishment to one of a different sort than that originally imposed upon a person.²³ It may be exercised at any time after the commission of an offense, either before legal proceedings are begun or during their pendency, and either before or after conviction.²⁴ It has been held that a person tendered a pardon may refuse it and thus render it ineffective.²⁵ The Supreme Court has declined to extend that rule to commutations of sentences.²⁶ It argued in the latter case that a pardon is not a "private act of grace" but "part of a constitutional scheme", and that, when granted, it is the "determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed." It is difficult to reconcile this theory with the decision

¹⁹ *Ex parte Garland*, 4 Wall. 333, 18 L.Ed. 366.

²⁰ *Brown v. Walker*, 161 U.S. 591, 16 S.Ct. 644, 40 L.Ed. 819.

²¹ *EX PARTE GROSSMAN*, 267 U.S. 87, 45 S.Ct. 332, 69 L.Ed. 527, 38 A.L.R. 131, *Black's Cas. Constitutional Law*, 2d, 65.

²² *EX PARTE GROSSMAN*, 267 U.S. 87, 45 S.Ct. 332, 69 L.Ed. 527, 38 A.L.R. 131, *Black's Cas. Constitutional Law*, 2d, 65.

²³ *BIDDLE v. PEROVICH*, 274 U.S. 480, 47 S.Ct. 664, 71 L.Ed. 1161,

52 A.L.R. 832. *Black's Cas. Constitutional Law*, 2d, 354. See also *Lupo v. Zerst*, 5 Cir., 92 F.2d 362, holding that the pardon power includes that of granting a conditional commutation of sentence and of revoking it on breach of condition.

²⁴ *Ex parte Garland*, 4 Wall. 333, 18 L.Ed. 366.

²⁵ *Burdick v. United States*, 236 U.S. 79, 35 S.Ct. 267, 59 L.Ed. 476.

²⁶ *BIDDLE v. PEROVICH*, 274 U.S. 480, 47 S.Ct. 664, 71 L.Ed. 1161, 52 A.L.R. 832, *Black's Cas. Constitutional Law*, 2d, 354.

permitting the refusal of a pardon, but that case has not been expressly overruled. The effect of a full pardon is not only to release the punishment but also to blot out the existence of the guilt.²⁷

PRESIDENT'S RELATIONS WITH CONGRESS

203. The President is required from time to time to give to Congress information of the state of the Union and to recommend to their consideration such measures as he shall judge necessary and expedient.²⁸
204. He may also, on extraordinary occasions, convene both Houses, or either of them, and may, in case of disagreement between them with respect to the time of adjournment, adjourn them to such time as he shall think proper.²⁹
205. The President has the constitutional authority to veto any act or joint resolution of Congress, but it may re-pass the same over his veto by a two-thirds vote of both Houses.

The only one of the foregoing powers requiring any consideration is the veto power. This has been fully discussed in Chapter 6, Section 108.

PRESIDENT'S POWER IN FOREIGN RELATIONS

206. The Constitution provides that the President shall have the power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur.³⁰
207. The President shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls.³¹
208. The President shall receive ambassadors and other public ministers.³²

The President's functions in the direction and control of the nation's foreign affairs, and in the making of treaties, were discussed in Chapter 10, Sections 186-190.

²⁷ Ex parte Garland, 4 Wall. 333, 18 L.Ed. 366.

²⁸ U.S.C.A.Const. Article 2, Section 3.

²⁹ U.S.C.A.Const. Article 2, Section 3.

³⁰ U.S.C.A.Const. Article 2, Section 2, Clause 2.

³¹ U.S.C.A.Const. Article 2, Section 2, Clause 2.

³² U.S.C.A.Const. Article 2, Section 3.

APPOINTMENT AND REMOVAL OF OFFICERS

209. The President shall nominate, and by and with the advice and consent of the Senate shall appoint, judges of the Supreme Court, and all other officers of the United States whose offices shall be established by law.
210. Officers whose appointment is otherwise provided for in the Constitution are not subject to the foregoing method of appointment.
211. Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments.
212. The Constitution contains no express provision for the removal of any civil officer of the United States except by impeachment for specified reasons.³³

Appointment of Officers

The personnel of the government of the United States consists not only of officers of the United States but of a vast body of employees as well. The Constitution provides expressly for the appointment of the former only. There can be no office unless it has been established by either the Constitution or an act of Congress. The President has no power to create an office. Among the officers provided for by the Constitution are the President, Vice-President, presidential electors, Senators, Representatives, and the officers of the two Houses of Congress. They are the officers whose appointments are expressly "otherwise provided for" by the Constitution. All other officers of the United States are subject to the joint appointing power of the President and Senate, except that Congress may vest the appointment of such inferior officers as it thinks proper in the President alone, in the courts of law, or in the heads of departments. There are no authoritative decisions as to what are inferior officers for whose appointment Congress may provide by one or the other of the several methods indicated above.³⁴ If Congress makes no such provision they too are subject to the joint appointing power of the President and the Senate. An appointment is generally deemed final and complete when a commission has been signed

³³ U.S.C.A.Const. Article 2, Section 4.

³⁴ See *Collins v. United States*, 14 Ct.Cl. 568.

by the President even prior to its delivery and acceptance by the appointee.³⁵

Recess Appointments

The Constitution provides that the President shall have the power to fill all vacancies that "may happen" during the recess of the Senate by granting commissions expiring at the end of the next session.³⁶ It has never been definitely determined whether a newly created office that has never been filled constitutes a "vacancy" within the meaning of this provision. It is the generally accepted view that a vacancy occurring while the Senate is in session and remaining unfilled at the end of such session is one which the President may fill by a recess appointment under this provision.³⁷ A recess appointment continues in force until the end of the next session of Congress unless sooner terminated by the President.³⁸

Congressional Appointments

Congress itself has no power to appoint officers of the United States other than its own officers. It is also without power to prescribe qualifications for office if the qualifications prescribed "so limit selection and trench upon executive choice as to be in effect legislative designation."³⁹ This dictum clearly implies that it may prescribe qualifications that do not have that effect.

Removals from Office

The Constitution does not expressly provide who shall exercise the power to remove an officer of the United States except by impeachment in the case of civil officers. This omission has given rise to important controversies. The power to remove can most conveniently be considered by taking into account the manner by which the person removed was appointed although that is not the only factor to be considered. The power to remove officers who are members of the executive branch of the government and who were appointed by the President by and with the advice and consent of the Senate is vested in the President alone. This has been judicially based upon the fact that the executive

³⁵ *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60. See, however, *United States v. Smith*, 286 U.S. 6, 52 S.Ct. 475, 76 L.Ed. 954.

³⁶ U.S.C.A.Const., Article 2, Section 2, Clause 3.

³⁷ *In re Farrow*, C.C., 3 F. 112.

³⁸ *In re Marshalship for Southern*, etc., of Alabama, D.C., 20 F. 379.

³⁹ *Myers v. United States*, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160.

power includes that of appointing and removing executive officers, upon the President's obligation to faithfully execute the laws of the United States, and upon the fact that it is an incident to the specific power to appoint such officers with the Senate's consent. The Court construed the express provision defining the Senate's part in the process as impliedly limiting its functions in relation to such officers to consenting to their appointment, and declined to base thereon a power to condition or check their removal. Acts of Congress requiring the Senate's consent to their removal, or in any other manner conditioning or preventing their removal by the President, are unconstitutional invasions of his power.⁴⁰ A later decision has expressly affirmed that these principles apply in the case of all purely executive officers, but do not apply in the case of officers occupying "no place in the executive department and who exercise no part of the executive power vested by the Constitution in the President."⁴¹ The members of administrative boards and commissions created by Congress to carry into effect its legislative policies which exercise "quasi-legislative and quasi-judicial" functions are not purely executive officers. The power to remove them if they have been appointed by the President with the Senate's consent undoubtedly is vested in the President. His power of removing them is, however, not illimitable as it is with respect to purely executive officers. Hence Congress may validly limit his removal of such officers in any manner it deems proper, and a statute permitting their removal for specified causes only is not an unconstitutional invasion of the President's power.⁴² The Court was largely influenced in reaching this result by the desire to protect the independence of such officers and administrative boards and commissions against the possibility of executive coercion, in order to maintain the constitutionally prescribed separation of powers. The same principle would apply in the case of judicial officers other than those constitutionally immune to removal by the President.⁴³ The character of the office thus de-

⁴⁰ *Myers v. United States*, 272 U. S. 52, 47 S.Ct. 21, 71 L.Ed. 160 (the officer involved in this case was a postmaster).

⁴¹ *RATHBUN v. UNITED STATES*, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611, Black's Cas. Constitutional Law, 2d, 356 (the officer involved in this case was a member of the Federal Trade Commission).

⁴² *RATHBUN v. UNITED STATES*, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611, Black's Cas. Constitutional Law, 2d, 356.

⁴³ See intimations to this effect in *RATHBUN v. UNITED STATES*, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611, Black's Cas. Constitutional Law, 2d, 356, see also *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60.

termines whether the President's power to remove an incumbent may be limited by Congress. It may not limit his power, if the officer was appointed by him with the Senate's consent, in the case of purely executive officers, but it may limit the power of removal of officers so appointed in the case of those performing quasi-legislative and quasi-judicial functions. Its power in the case of officers so appointed whose functions fall between these points is as yet undetermined, and there is as yet no body of decisions defining precise and inclusive tests for determining the character of an officer's functions for purposes of applying the foregoing principles.

The Congress can control the removal of inferior officers performing purely executive functions by exercising its power to vest their appointment in the President alone, in the courts of law, or in the heads of departments. It may not only vest their removal in the authority upon which it has conferred the power to appoint them, but may also limit the exercise of that removal power in such manner as it may deem expedient.⁴⁴ It is probably the law that the mere vesting of the power of appointing such officers in a particular authority carries with it the power in that authority to remove such officer.⁴⁵ It is undetermined what effect vesting the power of removal of such officers in some one other than the President has upon his power to remove them.

It is also an undetermined issue whether Congress itself may remove an officer if it has the power either to limit the President in removing him or to vest the power of removing him in some one other than the President. Judicial dictum opposes the existence of any such power in Congress.⁴⁶

Civil Service

The Congress has from time to time enacted laws placing federal officers and employees under civil service. Its power to do so in the case of employees would seem to be unimpeachable. Its power to do so in the case of officers would clearly be valid under the circumstances in which its power to prescribe qualifications would be valid.⁴⁷

⁴⁴ *United States v. Perkins*, 116 U.S. 483, 6 S.Ct. 449, 29 L.Ed. 700.

⁴⁵ *Ex parte Hennen*, 13 Pet. 230, 10 L.Ed. 138; *Reagan v. United States*, 182 U.S. 419, 21 S.Ct. 842, 45 L.Ed. 1162.

⁴⁶ Dictum in *Myers v. United States*, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160.

⁴⁷ See *Butler v. White*, C.C., 83 F. 578.

Commissioning Officers

The Constitution specifically requires the President to commission all officers of the United States.⁴⁸

EXECUTIVE POWERS OF THE PRESIDENT

213. The Constitution not only vests the executive power in the President, but also requires him to "take care that the laws be faithfully executed."⁴⁹

The President is the principal political officer of the United States. He is also the head of a great part of the machinery established by Congress for carrying into effect the legislative policies enacted by it. The Congress has from time to time established departments of government to assist the President in carrying out the executive duties imposed upon him by the Constitution or by legislation. The Constitution itself established no such departments although it clearly contemplated that they might be established. There are at present ten such departments each of which is in charge of a head appointed by the President with the Senate's consent, and responsible to him. The President is expressly authorized to require of the principal officer in each of the executive departments his written opinion upon any subject relating to the duties of his office.⁵⁰ The acts of the heads of these departments are in general deemed to be the acts of the President.⁵¹ The character of an act required of the President may be such that his own judgment is demanded in performing it, and in such case he may not delegate it to others.⁵² Congress may also impose upon the departments or their heads specific duties for the failure to perform which they may be held accountable in a judicial proceeding.⁵³ They are not, however, so accountable for acts performed by them if their act, when done, would be deemed that of the President as the nation's chief executive officer.⁵⁴

48 U.S.C.A.Const. Article 2, Section 3.

10 L.Ed. 264; *United States v. Jones*, 18 How. 92, 15 L.Ed. 274.

49 U.S.C.A.Const. Article 2, Section 1, Clause 1, and Section 3.

52 *Runkle v. United States*, 122 U. S. 543, 7 S.Ct. 1141, 30 L.Ed. 1167.

50 U.S.C.A.Const. Article 2, Section 2, Clause 1.

53 See *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60.

51 *Wilcox v. Jackson*, 13 Pet. 498,

54 *Georgia v. Stanton*, 6 Wall. 50, 18 L.Ed. 721; *MISSISSIPPI v.*

IMPEACHMENTS

214. The Constitution provides for the removal from office of the President, Vice-President and all civil officers of the United States by impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.⁵⁵ The House of Representatives has the sole power of impeachment,⁵⁶ while the sole power of trying impeachments is vested in the Senate.⁵⁷ Conviction requires the concurrence of two-thirds of the members present.⁵⁸ Judgment in case of conviction shall not extend further than to removal from office and disqualification to hold any office of honor, trust, or profit under the United States.⁵⁹

The only persons liable to impeachment are those mentioned above. This excludes all private persons and all officers of the military and naval forces of the United States. The grounds on which impeachment may be brought are only those mentioned above. Treason and bribery are well defined crimes. The precise scope of the phrase "other high crimes and misdemeanors" has never been authoritatively determined. The whole purpose of the process is to punish official misconduct, and any gross malversation in office, whether or not a punishable offense at law, may be made the ground of an impeachment. The commission of a crime not directly connected with the person's official position is a valid basis for an impeachment. All impeachments must originate in the House of Representatives and be tried by the Senate. When the President of the United States is being tried the Chief Justice of the Supreme Court is required to preside. There can be no conviction without the concurrence of two-thirds of the members of the Senate present. By an express provision of the Constitution, the right of trial by jury does not extend to cases of impeachment.⁶⁰ The extent of the punishment that may be meted out in cases of conviction is removal from office and disqualification to hold any office of hon-

JOHNSON, 4 Wall. 475, 18 L.Ed. 437, Black's Cas. Constitutional Law, 2d, 58. See also Chapter 3, Sections 53-55.

⁵⁵ U.S.C.A.Const. Article 2, Section 4.

⁵⁶ U.S.C.A.Const. Article 1, Section 2, Clause 5.

⁵⁷ U.S.C.A.Const. Article 1, Section 3, Clause 6.

⁵⁸ U.S.C.A.Const. Article 1, Section 3, Clause 6.

⁵⁹ U.S.C.A.Const. Article 1, Section 3, Clause 7.

⁶⁰ U.S.C.A.Const. Article 3, Section 2, Clause 3.

or, trust, or profit under the United States. The party convicted remains "liable and subject to indictment, trial, judgment, and punishment, according to law."⁶¹ The President's power to grant reprieves and pardons for offenses against the United States does not include cases of impeachment.⁶²

⁶¹ U.S.C.A.Const. Article 1, Section 3, Clause 7.

⁶² U.S.C.A.Const. Article 2, Section 2, Clause 1.

CHAPTER 13

FEDERAL JUDICIAL POWER

- 215-218. Judicial Department of the United States.
- 219. Judicial Power of the United States.
- 220. Judicial Power Based on Character of Cause.
- 221. Judicial Power Based on Character of Parties.
- 222. Other Cases within Federal Judicial Power.
- 223. Jurisdiction of the Supreme Court.

JUDICIAL DEPARTMENT OF THE UNITED STATES

- 215. The Constitution vests the judicial power of the United States in one Supreme Court and in such inferior courts as Congress may from time to time establish.
- 216. The judicial tribunals established by Congress include not only constitutional courts established under its power to constitute tribunals inferior to the Supreme Court but also legislative courts established under some of its other powers such as that of making all needful rules and regulations respecting the territory belonging to the United States and that of hearing and determining claims against the United States. No part of the judicial power defined by Article 3 of the Constitution may be conferred upon a legislative court.
- 217. It lies with Congress to determine the extent of the jurisdiction of any inferior federal court established by it, and of the appellate jurisdiction of the Supreme Court.
- 218. The independence of the judicial department is secured in part by the principles of the separation of powers incorporated in the Constitution, and in part by express provisions thereof.

The Constitution vests the entire judicial power of the United States in one Supreme Court and in "such inferior courts as Congress may from time to time ordain and establish."¹ It also confers upon Congress the power "to constitute tribunals inferior to the Supreme Court."² The Supreme Court is the only court established by the Constitution itself. It does not, however,

¹ U.S.C.A.Const. Article 3, Section 1

² U.S.C.A.Const. Article 1, Section 8, Clause 9.

exist as a functioning organization merely because of that fact. The action of Congress is necessary to create the particular organization that is to constitute the Supreme Court, and that of the President and the Senate is required in order that it have the personnel which alone can make of it in fact a functioning organ of the federal government. These other departments are accountable only politically for any failure or refusal on their part to do the acts requisite for the organization of a Supreme Court capable of functioning as such. No occasion has ever arisen for determining whether the repeal of a statute providing for the organization of the Supreme Court would terminate the existence of the particular organization existing as the Supreme Court under the repealed statute. The Constitution provides for the establishment of but one Supreme Court, but there is nothing therein that would prevent Congress from depriving it of all except the original jurisdiction conferred upon it thereby. The number of the justices comprising the present Supreme Court is nine, but their number lies within the sole discretion of Congress. Recent events have shown the threat to the Court's independence that may arise from the failure of the Constitution to fix at least a maximum number. The Constitution is also silent on the qualifications necessary not only for justices of the Supreme Court but also for judges of the inferior federal courts.

The same provision of the Constitution that establishes the Supreme Court also provides for the establishment by Congress of inferior federal courts in which the federal judicial power may be vested. It may vest in them not only original jurisdiction of cases within the federal judicial power, but also appellate jurisdiction therein.³ The power of Congress to establish courts exercising judicial power inferior to the Supreme Court is not, however, limited to that conferred by the Judiciary Article and the specific grant of Article 1 to constitute tribunals inferior to the Supreme Court. It has from time to time established judicial tribunals in executing its power to make all needful rules and regulations respecting the territory belonging to the United States. The territorial courts were established in the exercise of that power.⁴ The Court of Claims has been held to have been established in the exercise of its power to provide for the investigation and settlement of those claims against the United

³ See discussion in *MARTIN v. HUNTER'S LESSEE*, 1 Wheat. 304, 4 L.Ed. 97, Black's Constitutional Law, 2d, 374.

⁴ *American Ins. Co. v. Canter*, 1 Pet. 511, 7 L.Ed. 242.

States with respect to which it has waived its sovereign immunity from suit.⁵ Other courts of the United States established by the exercise of other powers than that of constituting tribunals inferior to the Supreme Court are the United States Court for China⁶ and the Court of Customs and Patent Appeals.⁷ Courts established by an exercise of the power of constituting tribunals inferior to the Supreme Court are known as "constitutional courts", while those established in the exercise of any other Congressional power are known as "legislative courts." The former alone can be vested with any part of the judicial power conferred upon the United States by Article 3 of the Constitution. The latter have been said to be incapable of receiving any part of it, in a case involving the constitutional status of territorial courts.⁸ This view implies the existence of a limit on the power of Congress to constitute tribunals inferior to the Supreme Court. It is practically impossible to discover from the cases any general principle defining what that limit is. The reason for this is that the usual issue has been not whether Congress could validly have created the particular court, the constitutional status of which was in question, by an exercise of that power, but whether it had in fact done so. It is only insofar as judicial reasoning in support of a conclusion that a given tribunal is not a constitutional court expressly or impliedly relies upon the theory that such tribunal could not be made a constitutional court that the scope of the limiting principle can be discerned. It has been suggested that the temporary character of territorial governments prevents territorial courts from acquiring the status of constitutional courts.⁹ The difficulties of determining the precise limits do not, however, affect the existence of the principle that there are judicial tribunals which Congress may establish but upon which it may not confer any of the judicial power defined by Article 3. This does not, however, imply that it may not in any case impose upon a constitutional court functions the performance of which are no part of that judicial power. The Supreme Court and the Court of Appeals of the District of Columbia are constitutional courts, but the plenary power of Congress over the District per-

⁵ *Williams v. United States*, 289 U.S. 553, 53 S.Ct. 751, 77 L.Ed. 1372.

411, 73 L.Ed. 789, *Black's Cas. Constitutional Law*, 2d, 364.

⁶ *In re Ross*, 140 U.S. 453, 11 S.Ct. 897, 35 L.Ed. 581.

⁸ *American Ins. Co. v. Canter*, 1 Pet. 511, 7 L.Ed. 242.

⁷ *EX PARTE BAKELITE CORPORATION*, 279 U.S. 438, 49 S.Ct.

⁹ See *O'Donoghue v. United States*, 289 U.S. 516, 53 S.Ct. 740, 77 L.Ed. 1356.

mits it to confer upon them jurisdiction in matters not within the judicial power as defined by Article 3 and to impose upon them purely administrative and quasi-legislative functions.¹⁰

It is thus essential in order that a given tribunal established by Congress be a constitutional court that it be capable of receiving a part of the judicial power of the United States as defined in Article 3, and that it shall have had a part thereof conferred upon it by Congress. The method for determining the existence of the former of these conditions was considered in the preceding paragraph. The latter condition is satisfied if Congress has defined a court's jurisdiction so as to include any cases enumerated in Article 3.¹¹ There are matters the decision of which Congress may reserve to itself, devolve upon executive or administrative officials, or vest in a court. Claims against the United States of a justiciable nature belong in that class. It has, accordingly, been held that the power to hear and determine such controversies is not a part of the judicial power defined by Article 3, and that, therefore, the Court of Claims is a legislative court.¹² It is, however, a court exercising judicial functions in hearing and determining such controversies. The Supreme Court has stated that that is the only basis on which its own appellate jurisdiction in respect of the judgments of the Court of Claims can be sustained, as well as the concurrent jurisdiction over such controversies conferred by Congress upon the federal District Courts.¹³ The imposition of the duty to hear and determine such controversies upon a constitutional court would not change their character, and they would still be no part of the judicial power defined by Article 3.¹⁴ Congress may thus impose upon a constitutional court judicial functions that are no part of that defined by Article 3, but it would violate the principle against the separation of powers to impose non-judicial functions upon it. It should also be noted that the Supreme Court's appellate jurisdiction in respect of judgments of the Court of Claims enables it to review cases that are no part of the judicial power as defined by Article 3. This seems a somewhat anomalous position in

¹⁰ *O'Donoghue v. United States*, 289 U.S. 516, 53 S.Ct. 740, 77 L.Ed. 1356; *Keller v. Potomac Electric Power Co.*, 261 U.S. 428, 43 S.Ct. 445, 67 L.Ed. 731.

¹¹ *O'Donoghue v. United States*, 289 U.S. 516, 53 S.Ct. 740, 77 L.Ed. 1356.

¹² *Williams v. United States*, 289 U.S. 553, 53 S.Ct. 751, 77 L.Ed. 1372.

¹³ *Williams v. United States*, 289 U.S. 553, 53 S.Ct. 751, 77 L.Ed. 1372.

¹⁴ See *Williams v. United States*, 289 U.S. 553, 53 S.Ct. 751, 77 L.Ed. 1372.

view of the language of Article 3 defining the scope of that Court's appellate jurisdiction.

The principal constitutional courts in the existing federal judicial system are the Supreme Court, the Circuit Courts of Appeal, the District Courts, and the Supreme Court and Court of Appeals for the District of Columbia. The entire jurisdiction of each of these courts other than the Supreme Court depends upon Congressional legislation.¹⁵ This is equally true of the appellate jurisdiction of the Supreme Court since the Constitution expressly provides that it shall have appellate jurisdiction in all cases not within its constitutionally defined original jurisdiction "with such exceptions, and under such regulations as the Congress shall make."¹⁶ The jurisdiction of the inferior federal courts, and the appellate jurisdiction of the Supreme Court, may be taken from them at any time by an Act of Congress, and this will prevent them from taking further proceedings even in cases already before them in which judgments have not yet been pronounced.¹⁷ The original jurisdiction of the Supreme Court is, however, independent of Congressional action. Congress can neither subtract from, nor add to, it.¹⁸ The jurisdiction of legislative courts is wholly a matter for Congress to determine.

The federal courts also possess all such incidental and ancillary powers as belong to courts of record and which are necessary to enable them to exercise their constitutional and statutory jurisdiction. The principal questions that have arisen with respect to these powers are the extent to which Congress may regulate their exercise by the courts, and the extent to which the President may exercise his pardon power to interfere therewith. The particular powers that Congress has sought to regulate most frequently have been that of adjudging persons in contempt of court and punishing them therefor, and that of issuing injunctions. The usual objections urged have been based on the theory that such regulations interfered with the constitutionally established separation of powers. It has been held that Congress may confer upon a person charged with contempt of court the right to demand a jury trial wherever the grant of that right will

¹⁵ See *Mississippi Power & Light Co. v. Jackson*, D.C., 9 F.Supp. 564 (sustaining statute withdrawing from jurisdiction of federal trial courts rate controversies involving intrastate utility rates under specified factual conditions).

¹⁶ U.S.C.A.Const. Article 3, Section 2, Clause 2.

¹⁷ *Ex parte McCordle*, 7 Wall. 506, 19 L.Ed. 264.

¹⁸ *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60.

not interfere with the effective functioning of the courts.¹⁹ It has also been held that it may deprive such courts of their power to issue injunctions in given classes of cases such as those involving labor disputes. This was sustained as a regulation of their jurisdiction rather than a regulation of an ancillary judicial power.²⁰ Its power to provide rules of procedure was recognized at an early date.²¹ The principal controversy between the courts and the Executive Department has been whether the President's power to grant pardons included that of pardoning contempts of court. It has been held to include pardoning at least criminal contempts.²²

The principle of the separation of powers is but one of the constitutional devices for protecting the independence of the courts. There are several other provisions primarily intended to insure that result. These include the provision that the judges of both the Supreme Court and the inferior courts shall hold office during good behavior, and that which prevents the reduction of their compensation during their continuance in office.²³ These provisions are applicable to the judges of constitutional courts only.²⁴ It has been held that the imposition of an income tax upon the salary of the judges of constitutional courts violates the provision against diminishing their salaries during their continuance in office.²⁵

¹⁹ *Michaelson v. United States ex rel. Chicago, St. P., M. & O. R. Co.*, 286 U.S. 42, 45 S.Ct. 18, 69 L.Ed. 162, 35 A.L.R. 451.

²⁰ *Levering & Garrigues Co. v. Morrin*, 2 Cir., 71 F.2d 284.

²¹ See discussion in *Wayman v. Southard*, 10 Wheat. 1, 42, 6 L.Ed. 262.

²² *Ex parte Grossman*, 267 U.S. 87, 45 S.Ct. 332, 69 L.Ed. 527, 38 A.L.R. 131.

²³ U.S.C.A.Const. Article 3, Section 1.

²⁴ See *Williams v. United States*, 289 U.S. 553, 53 S.Ct. 751, 77 L.Ed. 1372, and *O'Donoghue v. United States*, 289 U.S. 516, 53 S.Ct. 740, 77 L.Ed. 1356.

²⁵ *Evans v. Gore*, 253 U.S. 245, 40 S.Ct. 550, 64 L.Ed. 887, 11 A.L.R. 519; *Miles v. Graham*, 268 U.S. 501, 45 S.Ct. 601, 69 L.Ed. 1067 (overrules so far as the case applied the principle to a judge of the Court of Claims).

JUDICIAL POWER OF THE UNITED STATES

219. The Constitution provides that the judicial power of the United States shall extend to:

- (a) All cases, in law or equity, arising under the Constitution, the laws of the United States, and treaties made under their authority;
- (b) All cases affecting ambassadors, other public ministers and consuls;
- (c) All cases of admiralty and maritime jurisdiction;
- (d) Controversies to which the United States is a party;
- (e) Controversies between two or more states;
- (f) Controversies between a state and citizens of another state, excluding suits in law or equity commenced or prosecuted against a state by citizens of another state;
- (g) Controversies between citizens of different states;
- (h) Controversies between citizens of the same state claiming lands under grants of different states; and
- (i) Controversies between a state, or citizens thereof, and foreign states, citizens or subjects, excluding suits in law or equity commenced or prosecuted against a state by citizens or subjects of a foreign state.²⁶

The judicial power is the power of deciding cases and controversies. A case exists within it whenever the aid of the courts is invoked for the assertion or protection of legally protected claims in an adversary proceeding which eventuates in a judgment determining the rights and obligations of the parties in accordance with the applicable law.²⁷ It is not essential to its existence that the judgment in a case be one followed as of course by executory process for its enforcement.²⁸ Nor does the Constitution require that the issues be presented in accordance with traditional forms of procedure.²⁹ It is sufficient that a remedy has been provided enforceable in the courts according to some

²⁶ U.S.C.A.Const. Article 3, Section 2, Clause 1, and Amendment 11.

²⁷ *Muskraat v. United States*, 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246.

²⁸ See *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U.S. 249, 53 S.Ct.

345, 77 L.Ed. 730, 87 A.L.R. 1191, and *United States v. West Virginia*, 295 U.S. 463, 55 S.Ct. 789, 79 L.Ed. 1546.

²⁹ *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U.S. 249, 53 S.Ct. 345, 77 L.Ed. 730, 87 A.L.R. 1191.

regular course of legal procedure.³⁰ The existence of a case does not depend upon the subject matter of the litigation, and a proceeding intended to eventuate in a judgment that a person is entitled under existing law to a certificate of naturalization is a case within the judicial power.³¹ The precise difference between a "case" and a "controversy" within the federal judicial power has never been authoritatively defined, but it has been stated that the latter term, if distinguishable at all from the former, is less comprehensive and limited to suits of a civil nature.³² The term "case" includes suits of a criminal nature as well as those of a civil nature.³³

The cases and controversies within the federal judicial power are broadly divisible into two classes: (1) those based upon the character of the cause, whoever may be the parties, and (2) those based upon the character of the parties, whatever be the subject of controversy.³⁴ Congress may distribute this judicial power among the courts established by it in any manner it deems appropriate. A federal court may and must, in exercising original jurisdiction, decide every legal issue necessary for the determination of the cases brought into it if they are within its jurisdiction. The fact that the sole basis for its jurisdiction is the existence of a federal question in a case does not limit it to the decision of that issue.³⁵ The appellate jurisdiction of a federal court may be limited to the decision of federal questions, and is in fact so limited in some instances.

³⁰ *Tutun v. United States*, 270 U. S. 568, 46 S.Ct. 425, 70 L.Ed. 738.

³¹ *Tutun v. United States*, 270 U.S. 568, 46 S.Ct. 425, 70 L.Ed. 738.

³² See remarks of Mr. Justice Field in *In re Pacific Railway Commission*, C.C., 32 F. 241.

³³ *Tennessee v. Davis*, 100 U.S. 257, 25 L.Ed. 648.

³⁴ *COHENS v. VIRGINIA*, 6 Wheat. 264, 5 L.Ed. 257, Black's Cas. Constitutional Law, 2d, 369. See U.S.Const., Amendment 11, for cases excludible from federal judicial power as originally defined.

³⁵ *Ellis v. Davis*, 109 U.S. 485, 3 S.Ct. 327, 27 L.Ed. 1006.

JUDICIAL POWER BASED ON CHARACTER OF CAUSE

220. The Constitution makes the character of the cause the basis for the inclusion of a case within the federal judicial power in cases arising under the Constitution, laws and treaties of the United States, and in cases of admiralty and maritime jurisdiction.

The question of what cases are includible within the federal judicial power must be distinguished from that of the jurisdiction of particular federal courts. The scope of that judicial power depends upon the constitutional provisions defining and limiting it. The extent of a given federal court's jurisdiction is determined by Congressional legislation, except in the case of the original jurisdiction of the Supreme Court. The decisions construing the statutes that have defined the jurisdiction of the several federal constitutional courts are, however, the principal source of authoritative discussions of the scope of federal judicial power.

Federal Questions

The most important single class of cases within the federal judicial power consists of those arising under the Constitution and laws of the United States, and under treaties made under their authority. The inclusion of cases of this character within that judicial power made it possible to vest in some federal court the ultimate decision on every issue of federal law. It alone would not insure uniformity of decision on those matters throughout the United States since different federal courts of equal rank might well arrive at inconsistent decisions thereon. The attainment of such uniformity requires further that such inconsistent decisions be all reviewable by a superior court which meant in practice their review by the Supreme Court of the United States. It, however, could be given such appellate jurisdiction only because cases of this character are within the federal judicial power. A case is not brought within federal judicial power on this basis merely because a federal question may arise therein, but it is within that power if such question actually arises therein and if its decision is necessary to the determination of the controversy.³⁶ A case in which the plaintiff or complainant founds his claim on the federal Constitution, a feder-

³⁶ *McCain v. Des Moines*, 174 U.S. 168, 19 S.Ct. 644, 43 L.Ed. 936.

al statute, or a treaty, is clearly one involving a federal question since its decision turns on a proper application of one or the other of those forms of federal law.³⁷ A federal court may be given original jurisdiction of a case of that character. If the case of the plaintiff or complainant is founded wholly upon state law, the allegation in his complaint that the defense will rely upon federal grounds is insufficient to make the case one "arising under" the Constitution, laws or treaties of the United States.³⁸ A federal court cannot, therefore, be given original jurisdiction of such a case on the basis now being considered, but appellate jurisdiction may be conferred on a federal court to review the federal question raised therein since at that stage the case is one arising under the Constitution, laws or treaties of the United States with respect to such issue. It is not essential in order that a case be within federal judicial power on this basis that every issue involved in it depend upon federal Constitution, law or treaties.³⁹ It has, for example, been held that Congress may validly confer upon federal courts jurisdiction of all suits brought by a corporation organized under a federal statute, since that alone is sufficient to make such a case one arising under a law of the United States. It is immaterial in such case that the matter in controversy is one depending upon local law.⁴⁰ The mere inclusion of cases arising under the Constitution, laws and treaties of the United States within the federal judicial power does not deprive state courts of power to take jurisdiction of cases of that character, but Congress has the power to confer exclusive jurisdiction thereof upon the federal courts. It has not, however, done so.

Admiralty and Maritime Cases

The federal judicial power includes "all cases of admiralty and maritime jurisdiction." The jurisdiction of federal courts in cases of this character has been made exclusive by Congress. The scope of this part of the federal judicial power cannot be measured by the meaning of the terms "admiralty" and "maritime jurisdiction" at the time of the adoption of the Constitution.

³⁷ COHENS v. VIRGINIA, 6 Wheat. 264, 5 L.Ed. 257, Black's Cas. Constitutional Law, 2d, 369; Osborn v. Bank of United States, 9 Wheat. 738, 6 L.Ed. 204.

³⁸ Devine v. Los Angeles, 202 U.S. 313, 26 S.Ct. 652, 50 L.Ed. 1046.

³⁹ Mayor, etc., of Nashville v. Cooper, 6 Wall. 247, 18 L.Ed. 851.

⁴⁰ Osborn v. Bank of United States, 9 Wheat. 738, 6 L.Ed. 204.

It received a considerable expansion when the Supreme Court repudiated the "tidal flow" test of the navigability of waters⁴¹ in favor of that of navigability in fact.⁴² It is also competent for Congress to enlarge the scope of maritime jurisdiction by creating rights cognizable in admiralty.⁴³ The principal subjects of admiralty jurisdiction are maritime torts and maritime contracts. The maritime character of a tort depends upon its locality. It is not necessary that it occur on board a vessel but only that it occur upon the high seas or other navigable waters.⁴⁴ A tort committed upon a dock which is an extension of the land is not a maritime tort and is not within the admiralty jurisdiction.⁴⁵ The maritime character of a contract depends wholly upon its nature. If its subject matter is maritime it is a maritime contract. Among the contracts included are policies of marine insurance, charter parties, and contracts for maritime service. A bottomry bond is a maritime contract,⁴⁶ but an ordinary mortgage of a ship, not made with any special reference to navigation or the perils of the sea, was not a maritime contract until made so by an Act of Congress.⁴⁷ The federal judicial power thus extends to all cases of maritime torts and maritime contracts. The facts constituting such torts or contracts may, however, give rise to a right to a remedy at the common law. There is in such case no constitutional obstacle to resort to such common law remedy in a state court, and the federal statute conferring the admiralty and maritime jurisdiction upon the federal District Courts expressly recognizes this.⁴⁸ The enforcement of rights arising under maritime law by a proceeding *in rem* against a vessel is, however, reserved to the federal courts, and a state statute authorizing their enforcement by such proceedings in a state court is invalid.⁴⁹ The exclusive character of federal admiralty and maritime jurisdiction thus means only that proceedings *in rem* for the

⁴¹ *The Thomas Jefferson*, 10 Wheat. 428, 6 L.Ed. 358.

⁴² *The Genesee Chief v. Fitzhugh*, 12 How. 443, 13 L.Ed. 1058.

⁴³ *The Nanking*, D.C., 292 F. 642.

⁴⁴ *London Guarantee & Accident Co. v. Industrial Accident Commission of California*, 279 U.S. 109, 49 S.Ct. 296, 73 L.Ed. 632.

⁴⁵ *State Industrial Commission v.*

Nordenholt Corp., 259 U.S. 263, 42 S.Ct. 473, 66 L.Ed. 933, 25 A.L.R. 1013.

⁴⁶ *The Draco*, Fed.Cas.No.4057.

⁴⁷ See *The Nanking*, D.C., 292 F. 642, and *The Thomas Barlum*, 293 U.S. 21, 55 S.Ct. 31, 79 L.Ed. 176.

⁴⁸ See *Knapp, Stout & Co. v. McCaffrey*, 177 U.S. 638, 20 S.Ct. 824, 44 L.Ed. 921, and cases therein discussed.

⁴⁹ *The Moses Taylor*, 4 Wall. 411, 18 L.Ed. 397.

enforcement of causes based on maritime torts or maritime contracts must be brought in a federal court.

Legislative Power of Congress in the Field of Maritime Law

The paramount power of defining what shall constitute the maritime law of the United States lies with Congress. This power has been deduced from the provision of the Judiciary Article of the Constitution extending federal judicial power to "all cases of admiralty and maritime jurisdiction" and the constitutional provision conferring upon Congress the power "to make all laws which shall be necessary and proper for carrying into execution * * * all other powers vested by this Constitution in the government of the United States." These place the entire subject of maritime law, both substantive and procedural, under federal control, and confer upon Congress an ultimate power to determine that law subject to the limit that it must act within a sphere restricted by the concept of the admiralty and maritime jurisdiction.⁵⁰ The general maritime law as accepted by federal courts in exercising their admiralty jurisdiction governs in the absence of controlling federal statute, except that the states possess a limited power to modify and supplement the rules of the general maritime law.⁵¹ The power of Congress is subject to an important limit in addition to that already stated. It has been held that the purpose of including all cases of admiralty and maritime jurisdiction within the federal judicial power was to insure a body of maritime law which should, so far as its characteristic features were concerned, be uniform throughout the United States.⁵² It has, accordingly, been decided that Congress may not so modify the general maritime law as to save to persons injured in the course of maritime employment the rights and remedies available under the workmen's compensation acts of the states in which the injuries occur.⁵³ This is invalid even though masters and members of a ship's crew are excepted from the provisions of the saving clause.⁵⁴ Congress had enacted this legislation after it had been held that such state acts could not

⁵⁰ In re Garnett, 141 U.S. 1, 11 S. Ct. 840, 35 L.Ed. 631; Southern Pac. Co. v. Jensen, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086, L.R.A. 1918C, 451, Ann.Cas.1917E, 900; The Thomas Barlum, 293 U.S. 21, 55 S. Ct. 31, 79 L.Ed. 176.

⁵¹ Grant Smith-Porter Co. v. Rohde, 257 U.S. 469, 42 S.Ct. 157, 66 L.Ed. 321, 25 A.L.R. 1008.

⁵² Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 40 S.Ct. 438, 64 L. Ed. 834, 11 A.L.R. 1145.

⁵³ Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 40 S.Ct. 438, 64 L. Ed. 834, 11 A.L.R. 1145.

⁵⁴ State of Washington v. W. O. Dawson & Co., 264 U.S. 219, 44 S.Ct. 302, 68 L.Ed. 646.

validly apply of their own force to such maritime injuries.⁵⁵ The reasons for its invalidity were that it defeated the constitutionally required uniformity of maritime law and delegated federal legislative powers to the states. There are, however, certain local aspects of maritime activities which the states may regulate in the absence of applicable Congressional legislation.⁵⁶ There is no doubt of the power of Congress to expressly provide that state laws may apply to injuries occurring in connection with local phases of maritime activities. The line that separates those characteristic features of maritime law whose uniform application throughout the United States Congress may not impair from those local features not requiring such uniformity is exceedingly vague and tenuous. It is, however, a factor in defining the extent of Congress' power to modify or supplement the general maritime law of the United States. There is also no doubt that Congress is limited in its power to exclude from the cognizance of admiralty jurisdiction cases of maritime torts and maritime contracts that would be within it under the general principles of maritime law and jurisdiction.

State Power in the Field of Maritime Law

It is not essential in order that a right be enforceable in admiralty that it be a creature of general maritime law, or of that law as modified by valid Congressional legislation. A state may, within limits, create new substantive maritime rights which may validly be enforced by a proceeding in admiralty in a federal court having admiralty jurisdiction. It may give a cause of action for death due to a maritime tort where neither the general maritime law nor an Act of Congress gave it, and such right may be enforced in admiralty.⁵⁷ It may also create a lien for repairs to a vessel in its home port, or for supplies furnished it there, and the lien so created is enforceable in admiralty.⁵⁸ A state's power to modify or supplement the general maritime law is, however, rather narrowly limited. Its legislation in this field is unenforceable if in conflict with valid federal enactments, and invalid if it materially prejudices the characteristic features of

⁵⁵ *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086, L.R.A.1918C, 451, Ann.Cas.1917E, 900.

⁵⁶ *Western Fuel Co. v. Garcia*, 257 U.S. 233, 42 S.Ct. 89, 66 L.Ed. 210; *Grant Smith-Porter Co. v. Rohde*,

257 U.S. 469, 42 S.Ct. 157, 66 L.Ed. 321, 25 A.L.R. 1008.

⁵⁷ *Sherlock v. Alling*, 93 U.S. 99, 23 L.Ed. 819; *Old Dominion S. S. Co. v. Gilmore*, 207 U.S. 398, 28 S.Ct. 133, 52 L.Ed. 264.

⁵⁸ *The J. E. Rumbell*, 148 U.S. 1, 13 S.Ct. 498, 37 L.Ed. 345.

general maritime law or interferes with its proper harmony and uniformity in its international and interstate aspects.⁵⁹ A principal test used to determine the existence or non-existence of such results is the general or local character of the subject-matter of the state legislation. It is impossible to state a precise principle that is invariably followed in deciding whether the subject-matter is general or local. A state statute of frauds cannot validly apply to maritime contracts made within it since this would defeat the constitutionally required uniformity.⁶⁰ But a state may validly make the remedy afforded by its workmen's compensation act exclusive even as applied to a maritime tort where the injured employee was not employed under a maritime contract.⁶¹ The effect of this rule was to oust federal admiralty power of jurisdiction over a maritime tort. Such a state law could not validly apply where the injured employee was employed under a maritime contract.⁶² The limits on a state's power are practically identical with those applicable to the power of Congress to consent to the application of state law. A state cannot, however, confer admiralty powers upon its courts.⁶³

JUDICIAL POWER BASED ON CHARACTER OF PARTIES

221. The principal class of cases and controversies to which the federal judicial power extends, other than those based upon the character of the cause, is that in which the basis is the character of the parties. This class includes all cases and controversies mentioned in Section 219 except (1) those referred to in Section 220, (2) cases affecting ambassadors, other public ministers and consuls, and (3) controversies between citizens of the same state claiming land under grants of different states.

Diversity of Citizenship

The federal judicial power extends to controversies between citizens of different states. The reason for their inclusion was

⁵⁹ *Workman v. Mayor, etc., of New York*, 179 U.S. 552, 21 S.Ct. 212, 45 L.Ed. 314; *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086, L.R.A.1918C, 451, Ann.Cas.1917E, 900; *Chelentis v. Luckenbach S. S. Co.*, 247 U.S. 372, 38 S.Ct. 501, 62 L.Ed. 1171.

⁶⁰ *Union Fish Co. v. Erickson*, 248 U.S. 308, 39 S.Ct. 112, 63 L.Ed. 261.

⁶¹ *Grant Smith-Porter Co. v. Rohde*, 257 U.S. 469, 42 S.Ct. 157, 66 L.Ed. 321, 25 A.L.R. 1008.

⁶² *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086, L.R.A.1918C, 451, Ann.Cas.1917E, 900.

⁶³ *The Moses Taylor*, 4 Wall. 411, 18 L.Ed. 397.

the fear that local jealousies and prejudices might prevent the citizens of one state from obtaining justice when suing the citizens of another state in the courts of the latter. Federal jurisdiction in cases of this character is not dependent upon the subject-matter of the controversy, but depends solely upon the character of the parties. The principal problem has, therefore, been to determine when the requisite diversity of citizenship exists. A natural person, other than a resident alien, is deemed to be a citizen of the state in which he is domiciled.⁶⁴ The term "state" includes only a state of the United States. A citizen of the District of Columbia, or of one of the territories, is not a "citizen of a state", and a suit between him and a citizen of one of the states is not within this part of federal judicial power.⁶⁵ The question whether a corporation could be considered a citizen of the state of its incorporation for purposes of defining the scope of this part of the federal judicial power came before the Supreme Court at a relatively early date. It was stated that it was not a citizen, but that a suit by it against the citizen of a state other than that of its incorporation would be within this constitutional provision if all of its members were residents of a state other than that of the defendant's residence.⁶⁶ This position was subsequently modified by adding a presumption that the members of a corporation are citizens of the state of its incorporation.⁶⁷ The presumption became in due course an irrebuttable one.⁶⁸ The result has been to treat a corporation as a citizen of the state of its incorporation so as to bring suits between it and the citizens of another state within the federal judicial power. The doctrine has been extended to municipal corporations which are for this purpose deemed to be citizens of the state of their creation.⁶⁹ It has not, however, been applied to a state itself.⁷⁰ Unincorporated associations have not been deemed corporations in

⁶⁴ *Gassies v. Ballou*, 6 Pet. 761, 8 L.Ed. 573; *Shelton v. Tiffin*, 6 How. 163, 12 L.Ed. 387.

⁶⁵ *Hepburn v. Ellzey*, 2 Cranch 445, 2 L.Ed. 332; *Corporation of New Orleans v. Winter*, 1 Wheat. 91, 4 L.Ed. 44.

⁶⁶ *Bank of United States v. Deveaux*, 5 Cranch 61, 3 L.Ed. 38.

⁶⁷ *Louisville, C. & C. R. Co. v. Letson*, 2 How. 497, 11 L.Ed. 353; *Mar-*

shall v. Baltimore & O. R. Co., 16 How. 314, 14 L.Ed. 953.

⁶⁸ *ST. LOUIS & S. F. R. CO. v. JAMES*, 161 U.S. 545, 16 S.Ct. 621, 40 L.Ed. 802, *Black's Cas. Constitutional Law*, 2d, 369.

⁶⁹ *Mercer County v. Cowles*, 7 Wall. 118, 19 L.Ed. 86.

⁷⁰ *Postal Telegraph Cable Co. v. Alabama*, 155 U.S. 482, 15 S.Ct. 192, 39 L.Ed. 231.

this connection.⁷¹ The presumption referred to above will not be used to limit federal jurisdiction, and a shareholder of a corporation existing under the laws of one state is not deemed a citizen thereof so as to prevent him from suing the corporation in a federal court if he is in fact a citizen of another state.⁷² The Constitution requires the controversy to be between citizens of different states. It has never been definitely determined whether this requires that all of the parties plaintiff to an indivisible controversy be citizens of states other than that of each of the parties defendant. The statutes that have conferred this part of the federal judicial power upon the several federal courts have invariably required this condition of the parties plaintiff and defendant.⁷³ In applying this rule the nominal or formal parties are excluded from consideration, and the parties are aligned according to their real interests in the controversy.⁷⁴ There is one other class of cases in which federal judicial jurisdiction depends upon diversity of citizenship. It includes controversies between citizens of a state and the citizens or subjects of a foreign state.

Suits to Which States are Parties

The judicial power of the United States includes several classes of cases based on the fact that a state is a party thereto. An important class is that between two or more states. One purpose of this provision was to preserve the peace of the Union by providing a method for the judicial settlement of controversies between the states. Many such controversies have been settled by this method. Most of them have involved boundary disputes between two or more states. Many other disputes between states have been adjudicated under this provision of the Constitution. A state may sue another state to protect its proprietary interests which have been injured, or are threatened with injury, by the acts of the latter.⁷⁵ A state may also sue another state even though its own proprietary interests are not involved. It has, for example, been permitted to institute suits of this character in its

⁷¹ Great Southern Fireproof Hotel Co. v. Jones, 177 U.S. 449, 20 S. Ct. 690, 44 L.Ed. 842. See Levering & Garrigues Co. v. Morrin, 2 Cir., 61 F.2d 115, for review of the authorities on this issue.

⁷² Doctor v. Harrington, 196 U.S. 579, 25 S.Ct. 355, 49 L.Ed. 606.

⁷³ California v. Southern Pac. Co., 157 U.S. 229, 15 S.Ct. 591, 39 L.Ed. 683.

⁷⁴ Removal Cases, 100 U.S. 457, 25 L.Ed. 593.

⁷⁵ Pennsylvania v. West Virginia, 262 U.S. 553, 43 S.Ct. 658, 67 L.Ed. 1117, 32 A.L.R. 300.

capacity as *parens patriae* or representative of a considerable portion of its citizens for the purpose of protecting their interests.⁷⁶ The mere maladministration of the laws of a state, to the injury of citizens of another state, does not, however, involve a controversy between states.⁷⁷ A suit by one state against another on the defaulted bonds of the latter owned by the former is included within this part of federal judicial power.⁷⁸ Suits between the states are included in the original jurisdiction conferred upon the Supreme Court by the Constitution. The Supreme Court has to a considerable extent been forced to develop an independent body of law applicable to controversies within this part of its jurisdiction.⁷⁹ The judicial power that it exercises in cases of this character includes the power of enforcing any judgment it may render therein even though its enforcement might operate upon the governmental powers of the defendant state.⁸⁰ The Court has thus far never authoritatively determined the measures that it would employ if such state should prove recalcitrant in carrying out the obligations imposed upon it by the judgment.⁸¹ It should be observed that the adoption of the Constitution constituted a waiver by the states of their sovereign immunity from suit without their consent with respect to controversies between them.⁸² States admitted after its adoption waive that immunity by their admission as states. This consent is, therefore, irrevocable except by constitutional amendment.

The federal judicial power also includes suits between a state and foreign states. It includes not only cases in which a state is the plaintiff but also those in which it is made defendant at the suit of a foreign state. The Constitution does not expressly limit federal jurisdiction in this class of cases to those in which

⁷⁶ *Missouri v. Illinois*, 180 U.S. 208, 21 S.Ct. 331, 45 L.Ed. 497; *North Dakota v. Minnesota*, 263 U.S. 365, 44 S.Ct. 138, 68 L.Ed. 342; *Pennsylvania v. West Virginia*, 262 U.S. 553, 43 S.Ct. 658, 67 L.Ed. 1117, 32 A.L.R. 300.

⁷⁷ *Louisiana v. Texas*, 176 U.S. 1, 20 S.Ct. 251, 44 L.Ed. 347.

⁷⁸ *South Dakota v. North Carolina*, 192 U.S. 286, 24 S.Ct. 269, 48 L.Ed. 448.

⁷⁹ See discussion in *Kansas v. Col-*

orado, 185 U.S. 125, 22 S.Ct. 552, 46 L.Ed. 838.

⁸⁰ *Virginia v. West Virginia*, 246 U.S. 565, 38 S.Ct. 400, 62 L.Ed. 883.

⁸¹ See discussion in the opinions in *South Dakota v. North Carolina*, 192 U.S. 286, 24 S.Ct. 269, 48 L.Ed. 448, and *Virginia v. West Virginia*, 246 U.S. 565, 38 S.Ct. 400, 62 L.Ed. 883.

⁸² See discussion of this problem in *MONACO v. MISSISSIPPI*, 292 U.S. 313, 54 S.Ct. 745, 78 L.Ed. 1282, *Black's Cas. Constitutional Law*, 2d, 376.

the state or the foreign state has waived its sovereign immunity from suit by consenting to be sued. It has, however, been decided that the existence of that immunity in the case of a state is an essential postulate of our constitutional system, and that a foreign state may not sue it without its assent.⁸³ The same immunity is accorded sovereign states by the accepted principles of international law, and it is certain that federal judicial power will not be construed to include suits brought by one of our states against a foreign state in the absence of the latter's consent to be sued. It was expressly stated in the case last cited that a foreign state enjoyed a sovereign immunity similar to that belonging to the states of the Union, and might not be sued by one of the latter without its consent. Suits of the class discussed in this paragraph are within the original jurisdiction of the Supreme Court so far as they are within the scope of federal judicial power as herein defined.

The Constitution as originally adopted extended federal judicial power to controversies between a state and citizens of another state. These are still included where the state is the plaintiff. The provision was originally construed to permit a citizen of one state to sue another state even without the latter's consent.⁸⁴ The opposition which this decision aroused led almost immediately to the adoption of the Eleventh Amendment which provided that the judicial power of the United States should "not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state." Its terms refer only to suits in law or equity, but it has been construed to include admiralty proceedings also.⁸⁵ The original Constitution also extended federal jurisdiction to controversies between a state and the citizens or subjects of foreign states. Suits by a state against an alien are still within federal judicial power, but the Eleventh Amendment now prevents an alien from suing a state in any federal court without that state's consent. The Eleventh Amendment, however, was intended to protect a state only from being sued without its consent, and a state may waive its immunity thereunder.⁸⁶ If a state waives its immunity when sued by a citizen of another

⁸³ *MONACO v. MISSISSIPPI*, 292 U.S. 313, 54 S.Ct. 745, 78 L.Ed. 1282, Black's Cas. Constitutional Law, 2d, 376.

⁸⁴ *Chisholm v. Georgia*, 2 Dall. 419, 1 L.Ed. 440.

⁸⁵ *Ex parte New York*, 256 U.S. 490, 41 S.Ct. 588, 65 L.Ed. 1057.

⁸⁶ *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 26 S.Ct. 252, 50 L.Ed. 477.

state or by an alien, the suit is one within federal judicial power on the basis of the character of the parties. All of the cases discussed in this paragraph to which the federal judicial power extends are cases within the original jurisdiction of the Supreme Court since they are cases in which a state is a party.

The Constitution does not extend federal judicial power to suits between a state and its own citizens. A suit between them lies within that power only if the character of the cause is such as to bring the case within it. The Eleventh Amendment does not, in terms, exclude a proper cause from federal judicial power merely because it is prosecuted by a citizen against his own state. It has, however, been held that the scope of federal judicial power based upon the character of the cause must be defined in the light of the general principle that a state may not be sued without its consent, and that a suit by a citizen against his own state is not within that power even though the case be one that would otherwise be within it.⁸⁷ The same principle of immunity has been applied to prevent a federal corporation from suing a state in a federal court without its consent.⁸⁸ A state may waive its immunity in either of these cases as it may its immunity in any case, whether based on the Eleventh Amendment or on the general constitutional postulate of sovereign immunity which is impliedly a part of the definition of the scope of federal judicial power in all but a few classes of cases.

Suits Between a Foreign State and Citizens of a State

The Constitution expressly extends federal judicial power to controversies between citizens of a state and foreign states. This language is broad enough to include not only suits by a foreign state against citizens of a state but also those by the latter against the former. However, it is certain that it will not be construed to include suits against a foreign state without its consent. It has, for example, been held that a public vessel owned by, and in the possession and service of, a friendly foreign state is immune from suit in a federal admiralty court, even when engaged in the carriage of merchandise for hire.⁸⁹ The decisions were not specifically based upon the Constitution, but reveal a tendency to recognize the immunity accorded sovereign states

⁸⁷ *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842.

⁸⁸ *Smith v. Reeves*, 178 U.S. 436, 20 S.Ct. 919, 44 L.Ed. 1140.

⁸⁹ *Berizzi Bros. Co. v. S. S. Pesaro*, 271 U.S. 562, 46 S.Ct. 611, 70 L.Ed. 1083; *The Navemar*, 303 U.S. 68, 58 S.Ct. 432, 82 L.Ed. 667.

under the principles of international law as a factor in the definition of federal judicial jurisdiction. It has been stated that a foreign state may not be sued by a state without the former's consent.⁹⁰ If that be so, it would be equally immune from suit by a citizen of a state unless it waived its immunity.

Suits to Which the United States is a Party

The federal judicial power expressly extends to controversies to which the United States shall be a party. This provision is a sufficient basis for including suits by the United States against private persons. It has also been held to include actions by the United States against a state.⁹¹ A state is deemed to have consented to such suits by becoming a member of the union established by the Constitution. It cannot withdraw that consent except by an amendment of the Constitution, and no further consent is required to enable the United States to sue it. It would seem that the federal judicial power would also include suits by the United States against a foreign state, although it would undoubtedly be held that a foreign state could not be sued without its consent. A suit against the United States without its consent is not, however, included within the federal judicial power under any of the provisions of Article 3. It may not be sued even by a state without its consent.⁹² It may, however, waive its immunity from suit, and, if it does, a suit against it is properly deemed to be one within the federal judicial power conferred by Article 3 if it is one to which a state is a party.⁹³ It is not absolutely clear whether a suit by a private person against the United States with its consent would be one within the judicial power defined by Article 3.⁹⁴ A suit by the United States against a state, and one by a state against the United States with its consent, is one within that part of the original jurisdiction of the Supreme Court which is founded on the fact that a state is a party thereto.⁹⁵

⁹⁰ *MONACO v. MISSISSIPPI*, 292 U.S. 313, 54 S.Ct. 745, 78 L.Ed. 1282, Black's Cas. Constitutional Law, 2d, 376.

⁹¹ *United States v. State of Texas*, 143 U.S. 621, 12 S.Ct. 488, 36 L.Ed. 285.

⁹² *State of Kansas v. United States*, 204 U.S. 331, 27 S.Ct. 388, 51 L.Ed. 510.

⁹³ *State of Minnesota v. Hitchcock*, 185 U.S. 373, 22 S.Ct. 650, 46 L.Ed. 954.

⁹⁴ See discussion in *Williams v. United States*, 289 U.S. 553, 53 S.Ct. 751, 77 L.Ed. 1372.

⁹⁵ *United States v. State of Texas*, 143 U.S. 621, 12 S.Ct. 488, 36 L.Ed. 285; *State of Minnesota v. Hitchcock*, 185 U.S. 373, 22 S.Ct. 650, 46 L.Ed. 954.

When a Suit is One Against a State or the United States

The immunity of a state from suit in a federal court under the circumstances heretofore described has made it necessary to determine when a suit is one against a state. The immunity based on the Eleventh Amendment does not protect the political subdivisions and municipal corporations of a state against being sued in the federal courts by a citizen of another state.⁹⁶ A suit against a corporation chartered by a state which owns a part or all of its capital stock has also been held not to be one against the state within the purview of that Amendment.⁹⁷ The same principles would exclude suits of the foregoing classes from the category of suits against a state in applying the rule that a state may not be sued in a federal court by its own citizens unless it has waived its immunity. The principal question has been when a suit against a state officer or board is one against the state so as to be prohibited by the Eleventh Amendment. The test originally adopted was whether the state was a formal party defendant on the record.⁹⁸ This simple test has long since been abandoned. The general rule is that a suit against an officer is one against a state only if its purpose and result would be to require action or abstinence by the officer which would in effect compel the state itself to perform an act or abstain therefrom, or affect its property interests. A suit against an officer is one against the state within this principle if a judgment against the former would have the effect of depriving the state of funds belonging to it or of compelling it to perform its contractual obligations.⁹⁹ A suit to enjoin an officer from enforcing a state statute violating the federal Constitution is not deemed one against the state.¹ The invalidity of the statute is held to prevent the act, or threatened act, of the officer from being that of the state so that enjoining him is not deemed enjoining the state. The officer is deemed in such cases to be acting in his private capacity

⁹⁶ *County of Lincoln v. Luning*, 133 U.S. 529, 10 S.Ct. 363, 33 L.Ed. 706.

⁹⁷ *Bank of United States v. Planters' Bank of Georgia*, 9 Wheat. 904, 6 L.Ed. 244; *Bank of Kentucky v. Wister*, 2 Pet. 318, 7 L.Ed. 437.

⁹⁸ *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L.Ed. 204.

⁹⁹ *Louisiana ex rel. Elliott v. Jewel*, 107 U.S. 711, 2 S.Ct. 128, 27 L.

Ed. 448, *Hagood v. Southern*, 117 U.S. 52, 6 S.Ct. 608, 29 L.Ed. 805; *In re Ayers*, 123 U.S. 443, 8 S.Ct. 164, 31 L.Ed. 216; *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 29 S.Ct. 458, 53 L.Ed. 742; *Lankford v. Platte Iron Works Co.*, 235 U.S. 461, 35 S.Ct. 173, 59 L.Ed. 316.

¹ *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714, 13 L.R.A., N.S., 932, 14 Ann.Cas. 764.

since the invalidity of the statute strips him of his official and representative character. The immunity of the United States from suit without its consent raises the same problem as to when a suit against an officer is one against the United States. The general principles developed in connection with that problem parallel closely those applied in determining the analogous problem of a state's immunity from suit.²

OTHER CASES WITHIN FEDERAL JUDICIAL POWER

222. The federal judicial power also extends to controversies between citizens of the same state claiming lands under grants of different states, and to all cases affecting ambassadors, other public ministers and consuls.

There have been but few cases construing the provisions of Article 3 extending federal judicial power to these cases and controversies. The factors requisite for making a case one "affecting ambassadors, other public ministers and consuls" have not yet been exhaustively defined. The constitutional provision was intended as a protection to the diplomatic and consular representatives accredited to the United States by foreign powers, not those representing this country abroad.³ Suits by or against foreign ambassadors or consuls accredited to the United States would appear to be cases affecting them whether their presence as parties be in their official or unofficial capacity. A criminal prosecution instituted by the United States is not a case affecting a public minister merely because the crime charged was an assault upon him.⁴ The constitutional provision does not by itself exclude the jurisdiction of a state in every case in which a diplomatic or consular representative of a foreign nation is made a defendant.⁵ It has been suggested that its scope excludes cases which the common understanding at the time of the adoption of the Constitution deemed exclusively reserved to the states.⁶ It was on that basis that the federal statute giving exclusive juris-

² See *Minnesota v. Hitchcock*, 185 U.S. 373, 22 S.Ct. 650, 46 L.Ed. 954; *Oregon v. Hitchcock*, 202 U.S. 60, 26 S.Ct. 568, 50 L.Ed. 935; *United States v. Lee*, 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171.

³ *Ex parte Gruber*, 269 U.S. 302, 46 S.Ct. 112, 70 L.Ed. 280.

⁴ *United States v. Ortega*, 11 Wheat. 467, 6 L.Ed. 521.

⁵ *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 50 S.Ct. 154, 74 L.Ed. 489.

⁶ *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 50 S.Ct. 154, 74 L.Ed. 489.

diction to federal courts of suits against consuls was held not to prohibit a suit for divorce in a state court against a foreign consul who was a citizen of the country which he represented, but to include only ordinary civil proceedings.⁷ It is probable, therefore, that this part of federal judicial power includes only such suits brought by or against persons of the designated classes and criminal proceedings against them for violating federal laws.⁸ Cases affecting ambassadors, other public ministers and consuls, if within federal judicial power, are among those within the original jurisdiction of the Supreme Court. This, however, does not confer upon it exclusive original jurisdiction in such cases, and Congress may confer it upon another federal constitutional court.⁹ It should be noted that the matter herein discussed is not concerned with the principles defining the immunities of the diplomatic and consular representative of one country within another.

JURISDICTION OF THE SUPREME COURT

223. The Constitution provides that the Supreme Court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and in cases in which a state shall be a party. It also confers upon that Court appellate jurisdiction, both as to law and fact, in all other cases to which the judicial power of the United States extends, with such exceptions, and under such regulations, as Congress may make.

Original Jurisdiction of the Supreme Court

The original jurisdiction of the Supreme Court is the only jurisdiction possessed by a federal court of which Congress cannot deprive it.¹⁰ Neither has Congress any power to add thereto.¹¹ It may, however, confer upon inferior federal courts original jurisdiction in some of the cases included within the original juris-

⁷ Ohio ex rel. Popovici v. Agler, 280 U.S. 379, 50 S.Ct. 154, 74 L.Ed. 489.

⁸ As to criminal proceedings against consuls for violation of federal laws, see United States v. Rarava, 2 Dall. 297, 1 L.Ed. 388. As to the status of criminal proceedings in a state court against a consul for violating a state law, see discussions in Re Iasigi, D.C., 79 F. 751; Id.,

D.C., 79 F. 755; Iasigi v. Van de Carr, 166 U.S. 391, 17 S.Ct. 595, 41 L.Ed. 1045.

⁹ Börs v. Preston, 111 U.S. 252, 4 S.Ct. 407, 28 L.Ed. 419.

¹⁰ United States v. Hudson, 7 Cranch 32, 3 L.Ed. 259.

¹¹ Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60.

diction of the Supreme Court as defined by the Constitution.¹² It has never been actually decided that it could do so in every such case. Cases in which a state is a party constitute the most important class within the Supreme Court's original jurisdiction. That class does not, however, include every case within federal judicial power to which a state is a party. It includes only those cases to which a state is a party in which federal judicial jurisdiction depends upon the character of the parties as distinct from the subject-matter of the controversy. It thus includes only cases between two or more states, cases between a state and citizens of another state, cases between a state and foreign states, citizens or subjects, and cases between the United States and a state.¹³ A case that is within the federal judicial power on any other basis, such as the nature of its subject matter, is not brought within the Supreme Court's original jurisdiction merely because a state is a party thereto.¹⁴ The Eleventh Amendment which prohibits a suit against a state by a citizen of another state or by an alien is a limit on the original jurisdiction of the Supreme Court as it is on the jurisdiction of any federal court. Nor can its prohibitions be circumvented by a citizen assigning to his state his cause of action against another state in order that the former may recover thereon for the benefit of its assignor.¹⁵ An absolute assignment would have permitted the suit since in that case the plaintiff state would be suing to assert its own interest.¹⁶ The original jurisdiction is also limited by the constitutionally defined immunity of a state from suit without its consent even where that does not rest on the Eleventh Amendment.¹⁷ A case to which a state is a party plaintiff is not excluded from the Court's original jurisdiction merely because the defendant is a private person.¹⁸ That jurisdiction does not,

¹² *Börs v. Preston*, 111 U.S. 252, 4 S.Ct. 407, 28 L.Ed. 419; *Ames v. Kansas ex rel. Johnston*, 111 U.S. 449, 4 S.Ct. 437, 28 L.Ed. 482; *United States v. California*, 297 U.S. 175, 56 S.Ct. 421, 80 L.Ed. 567.

¹³ *United States v. Texas*, 143 U.S. 621, 12 S.Ct. 488, 36 L.Ed. 285; *California v. Southern Pac. Co.*, 157 U.S. 229, 15 S.Ct. 591, 39 L.Ed. 683.

¹⁴ *California v. Southern Pac. Co.*, 157 U.S. 229, 15 S.Ct. 591, 39 L.Ed. 683.

¹⁵ *New Hampshire v. Louisiana*, 108 U.S. 76, 2 S.Ct. 176, 27 L.Ed. 656.

¹⁶ *South Dakota v. North Carolina*, 192 U.S. 286, 24 S.Ct. 269, 48 L.Ed. 448.

¹⁷ *MONACO v. MISSISSIPPI*, 292 U.S. 313, 54 S.Ct. 745, 78 L.Ed. 1282, *Black's Cas. Constitutional Law*, 2d, 376.

¹⁸ *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 27 S.Ct. 618, 51 L. Ed. 1038, 11 Ann.Cas. 488.

however, include a proceeding brought by a state to enforce its penal laws.¹⁹

Appellate Jurisdiction of the Supreme Court

The appellate jurisdiction of the Supreme Court is capable of including every case to which federal judicial power extends other than those decided by it in the exercise of its original jurisdiction.²⁰ Its actual extent is, however, regulable by Congress.²¹ From a constitutional point of view the most important feature of this appellate jurisdiction is the power to review the judgments and decrees of state courts where the cases in which these were rendered turned on the validity under the Constitution of a federal law or treaty or of a state constitutional or statutory provision. The inclusion of such cases within the Supreme Court's appellate jurisdiction is constitutional.²² The Eleventh Amendment does not prevent such review in the case of a suit or criminal proceeding begun by the state.²³ The consideration of the statutory provisions governing the exercise of the Court's appellate jurisdiction is beyond the purview of this discussion.²⁴

¹⁹ *Oklahoma v. Gulf, C. & S. F. Ry. Co.*, 220 U.S. 290, 31 S.Ct. 437, 55 L.Ed. 469, Ann.Cas.1912C, 524.

SEE, 1 Wheat. 304, 4 L.Ed. 97, Black's Cas. Constitutional Law, 2d, 374.

²⁰ *MARTIN v. HUNTER'S LESSEE*, 1 Wheat. 304, 4 L.Ed. 97, Black's Cas. Constitutional Law, 2d, 374.

²³ *COHENS v. VIRGINIA*, 6 Wheat. 264, 5 L.Ed. 257, Black's Cas. Constitutional Law, 2d, 369.

²¹ Ex part *McCardle*, 7 Wall. 506, 19 L.Ed. 264.

²⁴ For a discussion of the principles applied in preventing conflicts between the federal judicial department and those of the states, see Chapter 4, Sections 87-91.

²² *MARTIN v. HUNTER'S LES-*

CHAPTER 14

THE FOURTEENTH AMENDMENT—GENERAL CONSIDERATIONS

- 224-225. Theory of Constitutional Limitations.
- 226-229. The Fourteenth Amendment—General.
- 230-231. The Privileges and Immunities of National Citizenship.
- 232. Federal Powers of Enforcing the Amendment.

THEORY OF CONSTITUTIONAL LIMITATIONS

- 224. The political theory that government should be limited for the protection of individual rights and interests has been incorporated into the constitutions of our system in the form of express limitations on the action of one or more of the departments of government.
- 225. The limitations on the federal government are all found in the federal Constitution; those on a state and its government are found in both the federal Constitution and that of the state itself.

The constitutional system under which the people of the United States are governed embodies the theory that all government should be limited to protect certain interests from governmental interference. This theory has been made legally effective through incorporating into our constitutions both specific and general limitations upon one or more of the organs through which governments function. These are contained in both the federal Constitution and in the constitutions of every one of the several states. Those imposed on the federal government and its departments are found in the federal Constitution only; those imposed on a state and its government are found in both that Constitution and that of the state itself. The existence of these limitations operates to prevent the government on which they are imposed from regulating in certain respects the subject matter lying within its general field of power. Their existence and the constitutionally prescribed division of power between the nation and the state will at times produce an immunity from certain kinds of regulation of conduct by both the federal government and the states. It is impossible to avoid this if these limitations are to be given their intended effect.

The restrictions on federal and state action contained in the federal Constitution are ultimately based on the view that it is

socially desirable to protect certain individual interests against arbitrary exercises of governmental power. It is impossible to define their scope without determining the interests they were intended to protect and the degree of protection intended to be accorded those interests. It is in connection with the latter of these that the consideration of other social interests than those protected by those limitations has had its greatest significance. The range of the protected individual interests includes both economic and non-economic interests of various kinds. Some of the limitations affect every department of the government to which they apply; others affect one only of such departments. They may limit not only the procedures of government in enforcing law but also the substance of the law itself. The issue whether the action of a particular governmental department violates these constitutional limitations is one for ultimate judicial determination. The inclusion in the federal Constitution of such limitations upon the states has thus given the federal Supreme Court an extensive power to review state action not for the purpose of maintaining the proper balance between the federal government and the states but to prevent the latter from invading individual rights so far as they are protected by those limitations.

THE FOURTEENTH AMENDMENT—GENERAL

226. The most important limitations imposed on the states by the federal Constitution are those found in the Fourteenth Amendment thereto.
227. These limitations apply only to action by a state, but they apply to each and every department, agency or instrumentality that exercises, or purports to exercise, any part of a state's governmental powers.
228. The action of a state's agency or instrumentality is considered that of the state even though its action is contrary to state law or in violation of the state's own constitution.
229. The persons entitled to invoke the protection of the several limitations of the Fourteenth Amendment vary with the several provisions. Only federal citizens may invoke the protection of its privileges and immunities clause, but its other provisions may be invoked by both citizens and aliens and by corporations as well as natural persons.

The most important series of limitations imposed on the states by the federal Constitution is found in the Fourteenth Amend-

ment. This prohibits a state from making or enforcing any law abridging the privileges or immunities of citizens of the United States, from depriving any person of life, liberty or property without due process of law, and from denying to any person within its jurisdiction the equal protection of the laws. It also confers upon Congress the power of enforcing these provisions by appropriate legislation. The purpose of all of these prohibitions was the prevention of certain kinds of action by a state. They were not aimed at action by private persons who neither act nor purport to act under the authority of a state.¹ A state can act only through the exercise of their powers by its several governmental departments and any other agencies or instrumentalities employed by it in carrying on the processes of government. The prohibitions of the Fourteenth Amendment apply to its legislative department. The vast majority of the cases in which that Amendment has been invoked have involved the validity of legislation under its requirements. The executive and judicial departments are also limited by its provisions.² Among the other state agencies that have been held limited by its prohibitions are its municipal corporations,³ public service commissions,⁴ tax boards,⁵ and the governing boards of publicly operated colleges.⁶ It is a well established rule that they apply to action by any officer or instrumentality authorized by a state's laws to exercise any part of its governmental power, and that they are coextensive with any exercise by a state of power, in whatever form it is exerted.⁷ It is sometimes difficult to

¹ CIVIL RIGHTS CASES, 109 U. S. 3, 3 S.Ct. 18, 27 L.Ed. 835, Black's Cas. Constitutional Law, 2d, 393; United States v. Harris, 106 U.S. 629, 1 S.Ct. 601, 27 L.Ed. 290.

² Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714, 13 L.R.A., N.S., 932, 14 Ann.Cas. 764; Sterling v. Constantin, 287 U.S. 378, 53 S.Ct. 190, 77 L.Ed. 375; Ex parte Virginia, 100 U.S. 339, 25 L.Ed. 676; Scott v. McNeal, 154 U.S. 34, 14 S.Ct. 1108, 38 L.Ed. 896; Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979.

³ Home Telephone & Telegraph Co. v. Los Angeles, 227 U.S. 278, 33 S.Ct. 312, 57 L.Ed. 510.

⁴ Reagan v. Farmers Loan & Trust Co., 154 U.S. 362, 14 S.Ct. 1047, 38 L.Ed. 1014.

⁵ Raymond v. Chicago Union Traction Co., 207 U.S. 20, 28 S.Ct. 7, 52 L.Ed. 78, 12 Ann.Cas. 757.

⁶ Hamilton v. University of California Regents, 293 U.S. 245, 55 S.Ct. 197, 79 L.Ed. 343.

⁷ Raymond v. Chicago Union Traction Co., 207 U.S. 20, 28 S.Ct. 7, 52 L.Ed. 78, 12 Ann.Cas. 757; Home Telephone & Telegraph Co. v. Los Angeles, 227 U.S. 278, 33 S.Ct. 312, 57 L.Ed. 510.

determine whether persons who are not members of the regularly established governmental structure have been authorized by the state to exercise a part of its governmental power. A person is not exercising any part of such power in exercising the ordinary civil rights belonging to him under the laws of the state so as to make him its agent subject to the prohibitions of the Fourteenth Amendment.⁸ If his exercise of those rights is to be limited by those prohibitions it will have to be on the theory that the state violated them in conferring those rights upon him. A person may, however, be deemed to be acting as the agent of the state in exercising powers as an official of a voluntary private association which is in no sense a part of the state's governmental establishment. It has been held that the executive committee of a political party is such when it exercises a statutorily conferred power to exclude negroes from voting in the party's primary election.⁹ The basis for the decision was that the statute had invested the committee with its power independently of the will of the party, and that, since the sole basis for its authority was the statute, the committee was acting on behalf of the state in prescribing and enforcing its rule. It is doubtful that this principle will be extended to include every statutory grant of power upon private persons to affect the interests of others by their acts under such power. It is more probable that the prohibitions of the Fourteenth Amendment will be made effective in such situations by finding the requisite state action in the legislative act granting the power rather than in the private exercise thereof. That the decision last considered was not intended to reverse the general principle that a person's exercise of his civil rights does not make him an agent of the state is evidenced by the later decision holding that the exclusion of negroes from a party's primary election by action of the party convention did not constitute exclusion by action of the state.¹⁰ A state is not deemed to be acting merely because its laws permit private persons to act.

A state officer, agent or other instrumentality has only such authority to act as has been conferred upon him or it by state law. Their acts cannot be deemed those of the state when not

⁸ CIVIL RIGHTS CASES, 109 U.S. 52 S.Ct. 484, 76 L.Ed. 984, 88 A.L.R. 3, 3 S.Ct. 18, 27 L.Ed. 835, Black's Cas. Constitutional Law, 2d, 393.

⁹ Nixon v. Condon, 286 U.S. 73, 45, 55 S.Ct. 622, 79 L.Ed. 1292, 97 A.L.R. 680.

¹⁰ Grove v. Townsend, 295 U.S.

done in either the actual or purported exercise of the powers conferred upon them. The position that a state acts only when its officers and instrumentalities remain within the strict limits of their authority has been invariably rejected. It has, accordingly, been held that the discriminatory enforcement of a statute which is not discriminatory in its terms constitutes a violation of the equal protection clause of the Fourteenth Amendment.¹¹ This principle has been frequently applied to prevent those charged with the assessment of taxes from systematically and intentionally effecting arbitrary classifications in valuing property of the same general class.¹² It is immaterial whether the agent's or instrumentality's lack of legal authority is based on an erroneous construction of the statute under which they purport to act or on its unconstitutionality under the provisions of the state's constitution. A state agency will not be permitted to deny that it is acting on behalf of the state because its act is violative of the state's constitution as long as it persists in enforcing, or threatens to enforce, a law which it treats as the source of its power to act in the premises. Its power to act must be tested by assuming that it possessed the power claimed by it whenever its acts are such that it would have no power to do them but for the possession of some authority from the state.¹³ It is not necessary in such a situation to show that the acts of such agency have been determined to be valid under the state constitution by that one of its departments empowered to render a final decision on that matter.¹⁴ The prohibitions of the Fourteenth Amendment control each of the separate departments or instrumentalities comprising a state's government, and it is not necessary in establishing state action to show co-operative action by all of its parts in producing the results which the Fourteenth Amendment was intended to prevent.¹⁵ This problem has usually arisen in cases involving the jurisdiction of federal courts to prevent violations of said Amendment. The rule as stated above has been judicially justified as necessary to the ef-

¹¹ *Virginia v. Rives*, 100 U.S. 313, 25 L.Ed. 667; *Ex parte Virginia*, 100 U.S. 339, 25 L.Ed. 676.

¹² *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 43 S.Ct. 190, 67 L.Ed. 340, 28 A.L.R. 979; *Iowa-Des Moines Nat. Bank v. Bennett*, 284 U.S. 239, 52 S.Ct. 133, 76 L.Ed. 265; *Cumberland Coal Co. v. Board of Revision of Tax Assessments in*

Greene County, Pa., 284 U.S. 23, 52 S.Ct. 48, 76 L.Ed. 146.

¹³ *Home Telephone & Telegraph Co. v. Los Angeles*, 227 U.S. 278, 33 S.Ct. 312, 57 L.Ed. 510.

¹⁴ *Home Telephone & Telegraph Co. v. Los Angeles*, *supra*.

¹⁵ *Home Telephone & Telegraph Co. v. Los Angeles*, *supra*.

fective enforcement of the provisions of that Amendment by the federal Courts. The foregoing principle is equally applicable where the agency's authority is legally non-existent because based on a grant violative of the federal Constitution. The decisive factor in determining whether the act of a state instrumentality is to be deemed that of the state for purposes of testing its conformity with the provisions of the Fourteenth Amendment is that such instrumentality is purporting to act under an authority claimed to have been conferred upon it by state law, and that the commission of the wrong which the Amendment was intended to prohibit is rendered possible or aided by state authority lodged in that instrumentality.¹⁶ The desire for an effective realization of the Amendment's objectives has compelled the view that a state acts even when its agencies abuse or exceed the limits of their technical legal authority.

The problem of what character of conduct by those purporting to act under authority of a state constitutes action by them has been before the courts in many cases. Any attempt at an affirmative enforcement of a state's laws is clearly action within the meaning of this Amendment. It, however, applies equally to other forms of conduct. The mere refusal of a state court to decide a claim that the state was denying the claimant the equal protection of the laws in subjecting him to unequal taxation constitutes action by the state as much as would an erroneous decision on that issue.¹⁷ A long continued and unreasonable delay by a state board in putting an end to confiscatory rates has been held to deprive a public utility of property without due process of law as effectively as would an express affirmance of such rates.¹⁸ The important factor in cases of this character is that the inaction or delay of a particular state agency permits the state to accomplish the results which the Amendment was intended to prevent. The inaction or delay of the one agency results in substance in permitting the more positive acts of another agency to become effective. The inaction or delay were stressed because they were the particular elements in the total enforcement process through which the injury was being accomplished at the time when relief was being sought.

¹⁶ Home Telephone & Telegraph Co. v. Los Angeles, *supra*.

¹⁷ Lawrence v. Mississippi Tax Comm., 286 U.S. 276, 52 S.Ct. 556, 76 L.Ed. 1102, 87 A.L.R. 374.

¹⁸ Smith v. Illinois Bell Tel. Co., 270 U.S. 587, 46 S.Ct. 408, 70 L.Ed. 747.

The persons entitled to invoke the protection of the Fourteenth Amendment vary with its several prohibitions. The provision that a state shall make or enforce no law abridging the privileges and immunities of citizens of the United States can be invoked only by such citizens since they alone possess any of those privileges and immunities. It has been frequently held that corporations are not citizens within the meaning of that term as used in this clause.¹⁹ The protection of the due process and equal protection clauses extends to all persons. They protect aliens as well as citizens,²⁰ and, insofar as they are capable of possessing interests of the character protected by those clauses, corporations as well as natural persons.²¹ Municipal corporations and political subdivisions established by a state for the government of its people are creatures of the state whose power over them is not restrained by the provisions of the Fourteenth Amendment.²² They have no privileges or immunities under it which they may invoke against their creator,²³ in respect of either their governmental or their proprietary activities.²⁴ A municipal corporation existing under the laws of one state may, however, invoke the provisions of the Amendment against another state. The protection of the equal protection clause is available only to a person within the jurisdiction of the state against whom it is invoked. The courts have never yet attempted a comprehensive definition of what is necessary in order that a person be deemed within a state's jurisdiction. The decisions in which the equal protection clause has been applied show that a person may be within a state's jurisdiction with respect to interests of property owned by him therein even though he is not a resident of that state. A state has the power of excluding foreign corporations from transacting local business within it, but, once admitted, they are within its jurisdiction with respect to such business and lawfully acquired property therein as long as they are permitted to remain.²⁵ It has even been held that a foreign cor-

¹⁹ *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 561, 10 S.Ct. 281, 43 L.Ed. 552; *Western Turf Ass'n v. Greenberg*, 204 U.S. 359, 27 S.Ct. 384, 51 L.Ed. 520.

²⁰ *Truax v. Raich*, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131, L.R.A.1916D, 545, Ann.Cas.1917B, 283.

²¹ *Western Turf Ass'n v. Greenberg*, 204 U.S. 359, 27 S.Ct. 384, 51 L.Ed. 520.

²² *Risty v. Chicago, R. I. & P. R. Co.*, 270 U.S. 378, 46 S.Ct. 236, 70 L. Ed. 641.

²³ *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 53 S.Ct. 431, 77 L.Ed. 1015.

²⁴ *Pederson v. Portland*, 144 Or. 437, 24 P.2d 1031.

²⁵ *Southern Ry. Co. v. Greene*, 216 U.S. 400, 30 S.Ct. 287, 54 L.Ed. 536, 17 Ann.Cas. 1247.

poration that had never been admitted to transact local business within a state was yet within its jurisdiction when suing in the state's courts to repossess property unlawfully taken from it which was in the possession of the wrongdoer in such state.²⁶ A person is, in effect, within a state's jurisdiction in respect of any of his interests insofar as those interests exist within that state with its consent.

THE PRIVILEGES AND IMMUNITIES OF NATIONAL CITIZENSHIP

230. The Fourteenth Amendment prohibits the states from making or enforcing any law abridging the privileges or immunities of citizens of the United States. This provision affords no protection against state action that affects a person in those rights, privileges and immunities that inhere in his state citizenship or that constitute a part of his general civil rights as a person.
231. The provision has not had the effect of subjecting the states to the same restrictions that are imposed on the federal government by the federal Bill of Rights found in the first eight Amendments to the federal Constitution.

The most important problems that have arisen in construing the provisions of the Fourteenth Amendment concern the scope of the protection afforded by them. This varies with the different provisions. It is, therefore, necessary to deal with each of them separately. It is an historical fact that the due process and equal protection clauses have proven to be far more effective in protecting individual interests than has the privileges and immunities clause, despite the fact that this last loomed largest in the period immediately following the adoption of the Amendment. The reason for this development is the construction that clause received in the first important case in which the Supreme Court considered the scope of the Fourteenth Amendment.²⁷ It involved the validity of a state statute conferring upon certain persons a monopoly of the slaughter house business within a designated area of the state. The claim that the exclusion of others from conducting such business within that area abridged their privileges in violation of this clause was denied on the score that its

²⁶ *Kentucky Finance Corp. v. Paramount Auto Exchange Corp.*, 262 U. S. 544, 43 S.Ct. 636, 67 L.Ed. 1112.

²⁷ *SLAUGHTER HOUSE CASES*, 16 Wall. 36, 21 L.Ed. 394, Black's Cas. Constitutional Law, 2d, 384.

protection was limited to privileges and immunities appurtenant to federal citizenship, and that the right to engage in an ordinary business or occupation was not included among them. Among the privileges and immunities of national citizenship that have received judicial recognition by the decisions or dicta of the courts are the right to freely pass from state to state;²⁸ the right to petition Congress for a redress of grievances;²⁹ the right to vote for national officers;³⁰ the right to be protected against violence while in the lawful custody of a United States marshal;³¹ and immunity from race discrimination in the exercise of the elective franchise.³² It is only privileges and immunities arising under the Constitution and laws of the United States by virtue of one's status as a federal citizen that are protected against abridgment by state action under this clause of the Fourteenth Amendment.

Attempts have been made from time to time to secure a judicial construction of this clause subjecting states to the same limitations that are imposed upon the federal government by the first eight Amendments. The theory was advanced that the rights secured against federal action thereby were among the privileges and immunities of federal citizenship protected against abridgment by the states under this clause of the Fourteenth Amendment. These attempts have invariably failed. It is true that a state may not abridge or interfere with one's assertion of the rights and privileges arising under those first eight Amendments, but a state is not doing that when it merely refuses to extend to its citizens in their relations with it rights and privileges of the same character and content as those arising under those Amendments against the federal government. A state is, for example, not abridging the federal citizen's right to petition Congress for the redress of grievances when it abridges the right of its own citizens to petition its legislature for a redress of grievances. It has, accordingly, been held that a state is not violating this constitutional clause in denying the right to a jury trial in civil suits in its own courts;³³ by permitting prosecutions for felonies to be commenced by information instead of by indict-

²⁸ *Crandall v. Nevada*, 6 Wall. 35, 18 L.Ed. 745.

²⁹ *United States v. Cruikshank*, 92 U.S. 542, 23 L.Ed. 583.

³⁰ *Ex parte Yarbrough*, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274.

³¹ *Logan v. United States*, 144 U.S. 263, 12 S.Ct. 617, 36 L.Ed. 429.

³² *United States v. Reese*, 92 U.S. 214, 23 L.Ed. 563.

³³ *Walker v. Sauvinet*, 92 U.S. 90, 23 L.Ed. 678.

ment;³⁴ by permitting persons to be convicted of felonies by a jury composed of less than twelve members;³⁵ or by denying an accused the privilege against self-incrimination.³⁶ It was decided in all these cases that the fact that the practices sustained therein would have violated provisions of the federal Bill of Rights, had the federal government sought to employ them, did not render them invalid under this clause of the Fourteenth Amendment when resorted to by a state.

A state could not validly have abridged the privileges and immunities of federal citizenship even prior to the adoption of the Fourteenth Amendment. The judicial construction that the adoption of the clause now under discussion added no new privileges and immunities to those pertaining to national citizenship deprived it of practically all effect and rendered it of small avail for the protection of private rights against action by the states. It was this that forced resort to the due process clause of the Amendment as the legal basis for their protection. It is but recently that the privileges and immunities clause was successfully invoked after a long period of desuetude to invalidate the application of a state statute.³⁷ The statute exempted from the state's income tax on the income from securities the interest received on a loan made within the state if the rate of interest thereon was not in excess of five percent. The interest on similar loans made without the state was subject to tax. The taxpayer involved in the case was a citizen of the United States as well as of the taxing state. It was explicitly decided that the right of a citizen of the United States to engage in business or to make a lawful loan in a state other than that of his residence was a privilege of federal citizenship which no state, not even that of which he was a resident and citizen, could abridge or impair. The imposition of a discriminatory tax upon his exercise thereof was held to be as effective an abridgment as a prohibition of his exercise thereof would have been, and was, accordingly held a violation of this clause of the Fourteenth Amendment. It is clear from expressions of the Court in the prevailing opinion in this case that the principle on which it was decided will be held to protect a citizen of the United States against attempts

³⁴ *Maxwell v. Dow*, 176 U.S. 581, 20 S.Ct. 448, 494, 44 L.Ed. 597.

³⁵ *Maxwell v. Dow*, *supra*.

³⁶ *Twining v. New Jersey*, 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97.

³⁷ *COLGATE v. HARVEY*, 296 U.S. 404, 56 S.Ct. 252, 80 L.Ed. 299, 102 A.L.R. 54; *Black's Cas. Constitutional Law*, 2d, 401.

by the state of his residence to fetter his economic and other activities across state lines. Since this clause is equally a limit on the power of states other than that of the residence or citizenship of the federal citizen invoking its protection, they too will be prohibited from thus fettering such citizen's economic activities across their state lines. The limits on their powers based on this clause are not the same as those resulting from the interstate privileges and immunities clause of Section 2 of Article 4 of the Constitution, and may well be much more extensive. It must now be taken as established that the privileges and immunities clause of the Fourteenth Amendment is something more than a useless duplication of protection secured by other provisions and principles of the federal Constitution, but it must still be held uncertain exactly what protection it affords which could not be derived from such other provisions and principles. It is not inconceivable that classifications not invalid under the equal protection clause of the Fourteenth Amendment might be held invalid abridgments of a federal citizen's privileges and immunities. It was fears of this character that produced the dissenting opinion in this case. It is, however, extremely improbable that this clause will supplant the due process and equal protection clauses of the Fourteenth Amendment as the most significant limitation on the exercise of their powers by the states. The scope of these will be considered in subsequent chapters.

FEDERAL POWER OF ENFORCING THE AMENDMENT

232. The fifth section of the Fourteenth Amendment confers upon Congress the power to enforce its provisions by appropriate legislation. The principal method for its enforcement is the judicial review by the Supreme Court of state action alleged to conflict with its provisions.

There remains for consideration at this point the extent of the powers possessed by Congress under the provision of the Amendment conferring upon it the power to enforce its provision by appropriate legislation. The primary factor in defining the scope of its powers is the fact that the limitations heretofore referred to are imposed upon the states. It may, accordingly, enact any corrective legislation that may be necessary and proper for counteracting state action which the state is prohibited by the Amendment from taking or enforcing. This includes the power of punishing those who purport to exercise a state's power so as to impair or defeat rights protected by its

provisions,³⁸ and of removing a case from a state court in which they are being denied to a federal court where they will be upheld.³⁹ It lies within the discretion of Congress how it will compel the state and its instrumentalities to observe the rights protected by this Amendment. Its power over the acts of individuals who neither act nor purport to act under authority of a state was not enlarged by the Amendment, and it cannot punish them for such acts on the basis of any grant of power made by its provisions.⁴⁰ The foregoing principles apply also to the powers conferred upon it under other Amendments that merely limit action by the several states.⁴¹ The principal method for enforcing compliance by the states with the limitations imposed on them by these provisions of the federal Constitution has been, and still is, judicial review of their attempts to enforce action in contravention thereof.

³⁸ *Ex parte Virginia*, 100 U.S. 339, 25 L.Ed. 676.

³⁹ *Strauder v. West Virginia*, 100 U.S. 303, 313, 25 L.Ed. 664.

⁴⁰ *United States v. Harris*, 106 U.S. 629, 1 S.Ct. 601, 27 L.Ed. 290;

CIVIL RIGHTS CASES, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835, *Black's Cas. Constitutional Law*, 2d, 393.

⁴¹ See, as to U.S.C.A.Const. 15th Amendment, *James v. Bowman*, 190 U.S. 127, 23 S.Ct. 678, 47 L.Ed. 979.

CHAPTER 15

DUE PROCESS AND EQUAL PROTECTION—REGULATION OF ECONOMIC ACTIVITIES

- 233-234. Regulatory Powers of Government.
- 235-240. Constitutional Limitations on Regulatory Powers.
- 241-242. Regulation of Business.
 - 243. Regulation of Capital and Labor Relations.
- 244-246. Regulation of Property and Its Use.
- 247-250. Regulation of Contract Relations.
 - 251. Due Process and Common Law Rights.
- 252-253. Civil Retrospective Legislation.
 - 254. Regulatory Legislation and the Equal Protection of the Laws.
 - 255. The Doctrine of Unconstitutional Conditions.

REGULATORY POWERS OF GOVERNMENT

- 233. The regulatory powers of the people of the United States are exercised in part by the federal government and in part by the states in accordance with the distribution effected by the federal Constitution.
- 234. The regulatory power of the states is known as their police power, and is broadly definable as their power to regulate their internal affairs for the protection and promotion of the public health, safety and morals, and of the general welfare.

Government is a device for the realization of objectives that are for some reason or other accepted as desirable. Its problems are due primarily to the fact that the simultaneous realization of all conceivable objectives is practically impossible. This necessarily compels the choice of some and the sacrifices of others. The system of values that constitutes the social ideal at any given time is likely to be composed of a wide variety of specific values not wholly consistent with each other. The particular system of values which government is protecting or aiming to achieve at any given time is likely to reflect the numerous compromises without which free government at least seems quite impossible. The only method available to government for realizing its objectives, whatever they be, is through the exercise of its various powers. The principal function of government as carried on within the United States is the regulation of the conduct of those

subject to its authority by making and enforcing rules therefor. Its power to tax and to take private property for public use are generally, but not always, employed to provide the means through which its regulatory power is made effective. There is an increasing tendency to extend the service enterprises conducted by government based on the theory that governmental assumption of such functions is desirable in order to achieve objectives that cannot be adequately secured through its regulatory powers. The regulation of conduct and the performance of such service activities are both expressions of the same fundamental governmental power to enact and enforce measures for promoting what is conceived to be the general welfare. The former type of governmental activity has, however, been much more prevalent in the past than has the latter. The limitations on government found in state and federal constitutions have, accordingly, been construed most often in relation to the regulatory functions of government.

The regulatory powers belonging to the people of the United States have been conferred by the federal Constitution upon both the federal government and the states. The portion thereof belonging to the states is a part of what is now generally referred to as their police power. Most definitions of that power have been formulated with a practically exclusive emphasis on this power of regulation, although a state's activities in prosecuting its service enterprises are equally a part thereof. The definitions of that power have varied from case to case and from time to time in respect of the number of specific objectives properly includible within its scope,¹ but that now generally accepted defines it as the power of a state to regulate its internal affairs for the protection and promotion not only of the public health, safety and morals, but also of the general convenience, prosperity and welfare.² It is not usual to refer to the regulatory powers of the national government as a federal police power. This is due to the fact that it has become customary to refer every regulation enacted by it to one of its specific or general delegated pow-

¹ See the following cases for various definitions of the term "police power": *License Cases*, 5 How. 504, 12 L.Ed. 256; *Louisiana ex rel. New Orleans Gaslight Co. v. Louisiana Light & Heat Producing Co.*, 115 U.S. 650, 6 S.Ct. 252, 29 L.Ed. 516; *NOBLE STATE BANK v. HASKELL*,

219 U.S. 104, 31 S.Ct. 186, 55 L.Ed. 112, 32 L.R.A.,N.S., 1062, Ann.Cas. 1912A, 487, Black's Cas. Constitutional Law, 2d, 410.

² *Halter v. State of Nebraska*, 205 U.S. 34, 27 S.Ct. 419, 51 L.Ed. 696, 10 Ann.Cas. 525.

ers among which no general regulatory power similar to a state's police power is included. It has, however, been recognized that many of its regulations have the quality of police measures,³ and a Congressional regulation of commerce has been described as an exercise of "the police power, for the benefit of the public, within the field of interstate commerce."⁴ It will promote convenience of discussion to follow accepted usage and limit the term "police power" to the general regulatory power possessed by the states. It should be observed that the constitutional issues with which the present chapter will deal all involve governmental action consisting of the regulation of private conduct, and that the term employed to indicate the power under which those regulations are enacted and enforced does not affect the character of those issues.

CONSTITUTIONAL LIMITATIONS ON REGULATORY POWERS

235. The exercise by a state of its police power is limited by numerous provisions of the federal Constitution and by other provisions contained in the constitutions of the respective states.
236. The exercise by the federal government of its regulatory powers within the scope of its delegated powers is limited by important provisions of the federal Constitution.
237. The judicial problem of defining the scope of regulatory legislation permissible within the limits of those constitutional provisions inevitably involves an evaluative process in which courts are compelled to discover the values intended to be secured by those provisions and to determine whether the legislative policies are in accord or in conflict therewith. This involves a degree of creative activity varying directly with the breadth of the policy enunciated by those constitutional provisions.
238. The due process clause of the Fourteenth Amendment to the federal Constitution which provides that no state shall deprive any person of life, liberty or property without due process of law, and the similar provision of the Fifth Amendment applicable to the federal government, invalidate regulatory legislation only if it is unreasonable or arbitrary.

³ KENTUCKY WHIP & COLLAR CO. v. ILLINOIS CENT. R. CO., 299 U.S. 334, 57 S.Ct. 277, 81 L.Ed. 270, Black's Cas. Constitutional Law, 2d, 230.

⁴ Brooks v. United States, 267 U.S. 432, 45 S.Ct. 345, 69 L.Ed. 699, 37 A.L.R. 1407.

239. The equal protection clause of the Fourteenth Amendment requires that states shall make no unreasonable and arbitrary classifications in devising their systems of regulatory legislation.
240. The reasonableness of such legislation, and of the classifications made in connection therewith, frequently depends on the factual situation existing at the time of its enactment or enforcement, and facts bearing thereon should be presented in evidence unless of such character that courts can take judicial notice of them.

The police power of a state and the regulatory powers of the federal government include not only the enactment of legislation but also its application and enforcement in specific cases. The federal Constitution imposes restrictions upon each in respect of both these matters. The most important of these applicable to a state are the provisions of the Fourteenth Amendment prohibiting it from depriving any person of life, liberty or property without due process of law, and from denying to any person within its jurisdiction the equal protection of the laws. The federal Bill of Rights contains many fairly specific limitations upon the federal government in the enactment and enforcement of regulatory legislation. The most broadly phrased of these is that found in the Fifth Amendment that no person shall be deprived of life, liberty or property without due process of law.

The enactment of new forms of regulatory statutes invariably involves restricting the existing private rights, privileges and powers of at least some persons. The due process clauses have not prevented an extensive governmental control of private economic interests for the protection and promotion of the general welfare, but have protected them against certain forms of legislative interference and regulation. It is impossible to draw the line separating the permissible from the prohibited forms of regulation by any mere linguistic interpretation of the terms of these constitutional provisions. It is rather the result of a process whose basic premise is the view that they express a broadly defined constitutional policy of protecting individual interests against unreasonable governmental action. It is a process in which the courts have been constantly forced to balance the claims of government to regulate private conduct as a means for achieving vaguely defined social objectives against those of private persons to be protected against being compelled to sacrifice their individual interests therefor. There underlies the judicial construction of these, and many other, constitutional limitations

the theory that the Constitution has guaranteed a society in which the individual shall have a wide but not unlimited freedom from governmental interference in the exercise of his powers. The general principle that has finally been developed for reconciling the claims of government to regulate and those of private interests to immunity therefrom is that due process is a guarantee only against unreasonable and arbitrary legislative or other governmental action.⁵

The judicial problem of defining the limits of reasonable regulatory legislation is ultimately one of appraising the relative worthwhileness of individualism and other social values. It is this even in those cases in which the immediate issue is between the competing individual interests of different social groups. The process is an evaluative one that cannot be adequately performed without the assumption of some theory of social values. The due process clauses do protect individual interests, but their language does not on its face indicate any test for determining how far it is reasonable to sacrifice them for the vague social objectives denoted by such concepts as the general welfare or the public good. The problem is inevitably one of choosing between competing values that have been so indefinitely described that interpretation of the constitutional provisions that both create the problem and constitute the formal basis for its solution is bound to involve a high degree of discretionary and creative activity by the courts empowered to give the final answer. The exercise of such discretion is unavoidable, but its scope tends to be limited to some extent by analogies and principles implicit in prior decisions.⁶ The force of this factor was necessarily of less importance during the earlier than during the later stages in the construction of these constitutional provisions. However, the view has never prevailed that the general concept of reasonableness could be rigidly limited by either precedent or formal definition, although its accepted limits of elasticity have varied from time to time. Its very indefiniteness has been the means for the gradual adaptation of the meaning of those constitutional limitations to changing conceptions of the proper place of individualism in the scale of social values.

The measurement of the reasonableness of specific regulations has been effected through requiring them to be for a proper

⁵ *NEBBIA v. NEW YORK*, 291 U. S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469, Black's Cas. Constitutional Law, 2d, 441.

⁶ *Merrick v. N. W. Halsey & Co.*, 242 U.S. 568, 37 S.Ct. 227, 61 L.Ed. 498.

legislative purpose, to bear a reasonable relation thereto, and to be neither arbitrary nor capricious.⁷ They need not in fact be effective means for accomplishing the object for which they were enacted.⁸ The requirement that they bear a real and substantial relation thereto means no more than that they shall not restrict individual freedom unduly.⁹ The proper purposes for which a state may legislate include the entire range of objectives for which it may exercise its police power. The proper purposes for which the federal government may legislate are defined by the terms in which its powers have been conferred upon it by the Constitution. The crucial problem in applying the due process and similar constitutional provisions lies rather in defining what is a reasonable amount of restriction on individual interests than in determining the general objectives that may be promoted thereby. The two factors, however, are to a considerable extent interdependent. A greater curtailment of individual interests is permissible to attain the more important social values than to attain those of lesser importance. The protection of the public health, for example, would justify a greater restriction on individual freedom than its protection against financial losses through fraudulent practices. The character of the judicial problem in this field makes it especially imperative that courts give real effect to the presumption of constitutionality attaching to all legislative acts. The problem is that of determining the validity of a legislatively prescribed policy by its conformity to a constitutionally defined policy. The difficulties are not due to the fact that the constitution has defined a given policy, but to the fact that the policies defined by such provisions as the due process and similar clauses cannot be determined with any degree of precision. They are functions of the very decisions in which they are applied, and those decisions themselves are the result of a process whose complexity is apparent when analysis makes explicit the assumptions implicit within it.

There is a marked difference between the protection accorded individual interests by the due process and equal protection clauses of the Fourteenth Amendment. The former limits the general character of regulation that may be imposed on conduct

⁷ *NEBBIA v. NEW YORK*, 291 U. S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469, Black's Cas. Constitutional Law, 2d, 441.

⁹ *NEBBIA v. NEW YORK*, 291 U. S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469, Black's Cas. Constitutional Law, 2d, 441.

⁸ *Otis v. Parker*, 187 U.S. 606, 23 S.Ct. 163, 47 L.Ed. 323.

even when it is applied to every case in which the regulated conduct occurs; the latter is a limit merely on the power of making classifications in the enactment and enforcement of regulatory legislation. A regulation violates the former if it is arbitrary and unreasonable, but can violate the latter only if the group subjected to it has been arbitrarily selected and defined.¹⁰ The general character of the judicial problem of determining whether a classification is or is not reasonable is similar to that of determining whether the standard of reasonableness required by due process has or has not been met. The reasonableness of a classification depends primarily upon the purpose for which it was made since that determines not only whether the class to which the legislation applies has been reasonably defined but also whether the differences in treatment between those included and those excluded from the class bear a real and substantial relation to the purposes sought to be attained. That purpose must also be one which the state may legitimately promote.¹¹ A state's power of regulation may be exercised to combat existing evils, and the scope of regulatory legislation may validly be made co-extensive with practical needs and be limited to cases in which evils have been especially experienced.¹² A classification that takes account of the different degrees in which an evil is present is also reasonable and valid.¹³ The particular factors that justify or invalidate the numerous classifications on which the courts have passed vary from case to case, but they all derive their significance from their relation to the reasonableness of the legislative judgment limiting the legislation to the cases included within it. It is these considerations that explain the refusal of courts to treat any particular basis of classification as either valid or invalid without reference to the problem in connection with which it was made. Thus a classification on the basis of alienage has been held invalid where it produced a discrimination against aliens in respect of the right to employment in industry,¹⁴ but

¹⁰ *Barbier v. Connolly*, 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923.

¹¹ *Truax v. Raich*, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131, L.R.A.1916D, 545, Ann.Cas.1917B, 283.

¹² *Carroll v. Greenwich Ins. Co.*, 199 U.S. 401, 26 S.Ct. 63, 50 L.Ed. 246; *Mutual Loan Co. v. Martell*, 222 U.S. 225, 32 S.Ct. 74, 56 L.Ed. 175, Ann.Cas.1913B, 529; *Prudential*

Ins. Co. v. Cheek, 259 U.S. 530, 42 S.Ct. 516, 66 L.Ed. 1044, 27 A.L.R. 27; *Keokee Consol. Coke Co. v. Taylor*, 234 U.S. 224, 34 S.Ct. 856, 58 L.Ed. 1288.

¹³ *Mutual Loan Co. v. Martell*, 222 U.S. 225, 32 S.Ct. 74, 56 L.Ed. 175.

¹⁴ *Truax v. Raich*, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131, L.R.A.1916D, 545, Ann.Cas.1917B, 283.

has been sustained in respect of their right to operate pool-rooms,¹⁵ to hunt,¹⁶ and to own real property within a state.¹⁷ Size, which is ordinarily not a valid basis for classification, is such if it is a reasonable index of the existence of an evil.¹⁸ The equal protection clause requires reasonable classification not only in imposing burdens, but in conferring immunities whose effect is in substance to increase the burdens of those excluded from the grant of immunity.¹⁹ This aspect is, however, more important in the field of taxation. It also requires equality of treatment among the members of the class, but the mere fact that this exists is no valid reason for sustaining the classification despite the fact that it is sometimes used by courts to support it.²⁰ The objection that legislation violates the equal protection clause is usually based on the claim that the defined class is too narrow, but is sometimes rested on the contention that it is too broad. The requirement of reasonableness is as applicable in the latter as in the former case.²¹

The issue of the validity of legislation under these provisions generally arises in connection with attempts at its enforcement. Its validity is sometimes specifically determined on the basis of conditions existing at that time, but more often by a consideration of those existing at the time of its enactment. The cases in which the former method is employed proceed on the theory that changed conditions may render arbitrary the enforcement of a regulation which may have been reasonable when it was enacted.²² Resort to the latter method can be justified whenever

¹⁵ *State of Ohio ex rel. Clarke v. Deekbach*, 274 U.S. 392, 47 S.Ct. 630, 71 L.Ed. 1115.

¹⁶ *Patsone v. Pennsylvania*, 232 U.S. 138, 34 S.Ct. 281, 58 L.Ed. 539.

¹⁷ *Terrace v. Thompson*, 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255.

¹⁸ *ENGEL v. O'MALLEY*, 219 U.S. 128, 31 S.Ct. 190, 55 L.Ed. 128, *Black's Cas. Constitutional Law*, 2d, 413; *Mutual Loan Co. v. Martell*, 222 U.S. 225, 32 S.Ct. 74, 56 L.Ed. 175; *Booth v. State of Indiana*, 237 U.S. 391, 35 S.Ct. 617, 59 L.Ed. 1011; *Jeffrey Mfg. Co. v. Blagg*, 235 U.S. 571, 35 S.Ct. 167, 59 L.Ed. 364; *Midleton v. Texas Power & Light Co.*, 249 U.S. 152, 39 S.Ct. 227, 63 L.Ed.

527; *McLEAN v. ARKANSAS*, 211 U.S. 539, 29 S.Ct. 206, 53 L.Ed. 315, *Black's Cas. Constitutional Law*, 2d, 465; *Chicago, R. I. & P. R. Co. v. Arkansas*, 219 U.S. 453, 31 S.Ct. 275, 55 L.Ed. 290; *St. Louis, I. M. & S. R. Co. v. Arkansas*, 240 U.S. 518, 36 S.Ct. 443, 60 L.Ed. 776.

¹⁹ *Truax v. Corrigan*, 257 U.S. 312, 42 S.Ct. 124, 66 L.Ed. 254, 27 A.L.R. 375.

²⁰ *Barbier v. Connolly*, 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923.

²¹ *Louisville & N. R. Co. v. Melton*, 218 U.S. 36, 30 S.Ct. 676, 678, 54 L.Ed. 921, 47 L.R.A., N.S., 84.

²² *Block v. Hirsh*, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865, 16 A.L.R.

there have been no significant changes between the dates of the enactment and enforcement of the act. The principle that the validity of legislation depends on whether the legislature had reasonable grounds for its enactment has been framed with reference to cases employing the latter method.²³ It cannot be employed where the issue is the effect of changed conditions upon the constitutionality of the enforcement of legislation. The legislation is sometimes so unreasonable and arbitrary on its face that its invalidity is readily determinable. The reasonableness of the legislature's action, however, cannot ordinarily be determined without considering the factual situation existing when the legislation was enacted. It is only by taking account thereof that a court can determine the reasonableness of the legislative judgment that evils existed and that the means adopted for dealing with them had a real and substantial relation to the attainment of the object aimed at. It is, therefore, essential that the factual background of such legislation be considered, and this requires that it be before the court when it passes on its validity. The facts may be of such character that the court can take judicial notice of them, but, if not of that class, they are properly the subject of evidence which should be presented to the court so that the decision of the constitutional issue can be based on adequate factual support.²⁴ This consideration is primarily important in its relation to the presumption of validity that attaches to all legislative action. This has been stated to be a rebuttable presumption of the existence of factual conditions supporting the legislation.²⁵ It means that, if any state of facts can reasonably be conceived under which the legislation would be valid, there is a presumption of the existence of such state of facts.²⁶ The presumption is sufficiently rebutted if the regulation could not be sustained under any conceivable state of facts, but in all other cases those who assail it must carry the burden of showing that

165; *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 44 S.Ct. 405, 68 L.Ed. 841.

²³ *O'Gorman & Young v. Hartford Fire Ins. Co.*, 282 U.S. 251, 51 S.Ct. 130, 75 L.Ed. 324, 72 A.L.R. 1163; *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703, 108 A.L.R. 1330.

²⁴ *Borden's Farm Products Co. v.*

Baldwin, 293 U.S. 194, 55 S.Ct. 187, 79 L.Ed. 281.

²⁵ *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 55 S.Ct. 187, 79 L.Ed. 281.

²⁶ *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369, Ann.Cas.1912C, 160; *McLEAN v. ARKANSAS*, 211 U.S. 539, 29 S.Ct. 206, 53 L.Ed. 315, Black's Cas. Constitutional Law, 2d, 465.

the action is arbitrary either by resort to matters which the court may judicially notice or to other legitimate proof.²⁷ The failure to do so where required is a sufficient basis for repelling an attack on legislation.²⁸ The presentation of such factual data should be made in the trial court, and the federal Supreme Court has on more than one occasion remanded a case to the trial court for an appropriate ascertainment of such facts.²⁹ Similar data are equally important and necessary for determining whether a change in circumstances has produced a condition rendering invalid the enforcement of a regulation that was valid when enacted.³⁰

REGULATION OF BUSINESS

241. There are no business or economic activities that are completely immune from governmental regulation. The due process and equal protection clauses affect merely the character and extent of their permissible regulation. The inevitable restrictions on individual freedom incident to the reasonable regulation of those activities do not amount to depriving the regulated persons of their liberty or property without due process in the constitutional sense of that conception, however great the degree of factual restriction may be.
242. The equal protection clause does not require that government give its regulatory legislation universal scope, but only that it make no arbitrary classifications in carrying its regulatory measures into effect.

The power to regulate is not limited to regulating acts that are themselves the source of the particular evil aimed at by legislation. The reasonableness of a regulation can often be determined only by considering its relation to an efficient administration of a valid governmental policy, and by taking account of the ways in which it might be defeated.³¹ This has been the basis for numerous decisions sustaining the prohibition of acts which,

²⁷ *Weaver v. Palmer Bros. Co.*, 270 U.S. 402, 46 S.Ct. 320, 70 L.Ed. 654.

Baldwin, 293 U.S. 194, 55 S.Ct. 187, 79 L.Ed. 281.

²⁸ *O'Gorman & Young v. Hartford Fire Ins. Co.*, 282 U.S. 251, 51 S.Ct. 130, 75 L.Ed. 324, 72 A.L.R. 1163.

³⁰ *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 44 S.Ct. 405, 68 L.Ed. 841.

²⁹ *Hammond v. Schappi Bus Line*, 275 U.S. 164, 48 S.Ct. 66, 72 L.Ed. 218; *Borden's Farm Products Co. v.*

³¹ *St. John v. People of State of New York*, 201 U.S. 633, 26 S.Ct. 554, 50 L.Ed. 896, 5 Ann.Cas. 909.

considered by themselves, were innocent of the particular evils aimed at by the broader legislative policy. The prohibition of the sale of non-intoxicating malt liquors does not violate due process since it is reasonably necessary for the efficient enforcement of a prohibition of the sale of intoxicants.³² The same reason justifies prohibiting a physician from prescribing malt liquors for medicinal purposes.³³ A state may validly include transactions from which the element of gambling is absent within the scope of a statute aimed at that evil. There is, accordingly, no violation of due process in prohibiting margin sales of corporate shares and dealings in futures even as applied to such transactions from which the element of gambling is absent.³⁴ The innocuous may be prohibited whenever reasonably necessary to the effective administration of a valid legislative policy.

Neither the due process nor the equal protection clauses prevent a state from adopting an optional rather than a compulsory system of regulation, or from creating a situation in which motives of private advantage are relied upon to induce those intended to be regulated to submit to the regulatory plan. Since the state could require regulation, it can adopt the milder form of optional control.³⁵ It may, therefore, resort to any reasonable device to insure that those whom it is intended to regulate shall voluntarily submit thereto, and this carries with it the right to influence their choice by attaching advantages to voluntary submission to the state's policy, or disadvantages to a refusal to do so. The division of the group sought to be regulated into these two classes, and the application of different rules to each of them, does not deny equal protection to those whose refusal to co-operate with the state involves a denial to them of advantages conferred on the others or the imposition of burdens from which the others are immune. An optional workmen's compensation law does not deny equal protection by penalizing non-con-

³² *Purity Extract & Tonic Co. v. Lynch*, 226 U.S. 192, 33 S.Ct. 44, 57 L.Ed. 184; *Ruppert, Inc. v. Caffey*, 251 U.S. 264, 40 S.Ct. 141, 64 L.Ed. 260.

³³ *Everard's Breweries v. Day*, 265 U.S. 545, 44 S.Ct. 628, 68 L.Ed. 1174.

³⁴ *Otis v. Parker*, 187 U.S. 606, 23 S.Ct. 168, 47 L.Ed. 323; *Booth v.*

Illinois, 184 U.S. 425, 22 S.Ct. 425, 46 L.Ed. 623.

³⁵ *Assaria State Bank of Assaria v. Dolley*, 219 U.S. 121, 31 S.Ct. 189, 55 L.Ed. 123; *Jeffrey Mfg. Co. v. Blagg*, 235 U.S. 571, 35 S.Ct. 167, 59 L.Ed. 364; *Middleton v. Texas Power & Light Co.*, 249 U.S. 152, 39 S.Ct. 227, 63 L.Ed. 527; *Hawkins v. Bleakly*, 243 U.S. 210, 37 S.Ct. 255, 61 L.Ed. 678, Ann.Cas.1917D, 637.

senting employers by depriving them of the usual common law defenses in actions brought by consenting, or even non-consenting, employees, nor by penalizing non-consenting employees by cutting down their common law rights of action against consenting employers.³⁶ There is no unconstitutional discrimination involved in according an advantage to those who aid in the effective execution of a valid state policy, or in imposing disadvantages on those opposing that end.³⁷ It is only necessary that all within a group be accorded the same opportunity to secure the advantage.³⁸ The selection of that group, however, must itself be reasonable in order to prevent the limitation of the choice from being considered an unreasonable classification. The equal protection clause does not require the advantage to be made available to those who are not members of the group sought to be regulated.³⁹ The validity of its limitation thus depends on the reasonableness of restricting the regulation to the class to which it is to be applied, and this depends on the general principles that determine the validity of any classification.

Prohibition as a Form of Regulation

There are no business or economic activities that are completely immune from governmental regulation in some form. The due process and equal protection clauses affect only the character and the extent of their permissible regulation. The power to regulate may take the form of an absolute prohibition of any transactions or businesses if there exists a reasonable basis for the legislature's view that such a measure is necessary for effectively preventing what it is free to regard as an evil.⁴⁰ This extreme form of regulation may be resorted to not only to promote such objectives as the public health, safety and morals, but also to promote any of the specific objectives within the scope of the general welfare, since the ultimate test of its validity is whether it is a reasonable means for dealing with an admitted

³⁶ Jeffrey Mfg. Co. v. Blagg, Hawkins v. Bleakly, and Middleton v. Texas Power & Light Co., supra, note 35.

³⁷ Borgnis v. Falk Co., 147 Wis. 327, 183 N.W. 209, 37 L.R.A., N.S., 489.

³⁸ Mathison v. Minneapolis Street Ry. Co., 126 Minn. 286, 148 N.W. 71, L.R.A.1916D, 412.

³⁹ Assaria State Bank of Assaria v. Dolley, 219 U.S. 121, 31 S.Ct. 189, 55 L.Ed. 123; Jeffrey Mfg. Co. v. Blagg, 235 U.S. 571, 35 S.Ct. 167, 59 L.Ed. 364; Middleton v. Texas Power & Light Co., 249 U.S. 152, 39 S.Ct. 227, 63 L.Ed. 527.

⁴⁰ Otis v. Parker, 187 U.S. 606, 23 S.Ct. 168, 47 L.Ed. 323.

evil. It has been justified as a reasonable means for promoting the general health and morals by prohibiting the manufacture and sale of intoxicating liquors,⁴¹ the sale of cigarettes,⁴² and the keeping of billiard halls.⁴³ It has also been justified as a means for promoting the general welfare by prohibiting margin sales of corporate shares,⁴⁴ and sales of grain and other commodity futures.⁴⁵ It is equally valid to secure the same results by requiring the payment of practically prohibitive license fees or taxes in every case in which direct prohibition would be valid.⁴⁶ There is no taking of property without due process in such cases merely because the prohibition entails the depreciation or destruction of the value of property theretofore devoted to the proscribed activities, and no compensation need be paid by the public for the incidental losses resulting from a valid exercise of a state's police power.⁴⁷ The power to prohibit does not extend to all business and other activities. It has been held that due process is violated by a statute prohibiting the operation of private employment agencies.⁴⁸ The courts have divided businesses in connection with this problem into those which are inherently vicious and harmful, those which are useful, and those lying between these two extremes which may or may not be harmful to the public depending on local circumstances or the manner in which they are conducted. The prohibition of businesses belonging to the first of these classes is invariably sustained; the prohibition of those belonging to the second class is invariably held to violate due process; and the prohibition of those in the last class is valid whenever there exists a danger

⁴¹ *Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205.

⁴² *Austin v. Tennessee*, 179 U.S. 343, 45 L.Ed. 224, 21 L.Ed. 132.

⁴³ *Murphy v. People of State of California*, 225 U.S. 623, 32 S.Ct. 697, 56 L.Ed. 1229, 41 L.R.A.,N.S., 153; *Clearwater v. Bowman*, 72 Kan. 92, 82 P. 526; *Corinth v. Crittenden*, 94 Miss. 41, 47 So. 525; *Cole v. Village of Culbertson*, 86 Neb. 160, 125 N.W. 287.

⁴⁴ *Otis v. Parker*, 187 U.S. 606, 23 S.Ct. 163, 47 L.Ed. 323.

⁴⁵ *Booth v. Illinois*, 184 U.S. 425, 22 S.Ct. 425, 46 L.Ed. 623.

⁴⁶ *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 36 S.Ct. 370, 60 L.Ed. 679, L.R.A.1917A, 421, Ann.Cas.1917B, 455; *Tanner v. Little*, 240 U.S. 369, 36 S.Ct. 379, 60 L.Ed. 691. Both these cases involved license fees on merchants using redeemable coupons, or similar devices, in the sale of merchandise within the state.

⁴⁷ *Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205; *Murphy v. People of State of California*, 225 U.S. 623, 32 S.Ct. 697, 56 L.Ed. 1229, 41 L.R.A.,N.S., 153.

⁴⁸ *Adams v. Tanner*, 244 U.S. 590, 37 S.Ct. 662, 61 L.Ed. 1336, L.R.A. 1917F, 1163, Ann.Cas.1917D, 973.

that local conditions or the manner of their conduct may harm the public interest.⁴⁹ The tests by which to determine whether a particular business belongs in one or the other of these classes are inevitably affected by conceptions of social policy prevailing in the community at the time that the prohibition is undertaken. This accounts in large measure for the conflicting decisions involving the same business that have been rendered by different courts.⁵⁰ A state is not prevented by the equal protection clause from creating exemptions from the scope of such prohibitory legislation if the grant thereof is justified by the general principles governing the reasonableness of classifications.⁵¹ Each such case depends largely upon its own special circumstances.

Restricting Right to Conduct Business to Limited Groups

The restriction of the conduct of a business to particular forms of organization involves a limited form of prohibition since it prevents those not thus organized from engaging therein. There are, however, circumstances in which such a restriction can reasonably be considered as promoting either the interest of that part of the public availing itself of its services or even the broader general welfare. It has, accordingly, been held that there is no violation of either due process or equal protection in limiting the right to engage in the businesses of banking,⁵² of receiving deposits,⁵³ and of insurance,⁵⁴ to corporations. It is immaterial that individuals had a right to engage therein at the common law, since the constitutional limits on a state's power of regulation are not fixed by the common law even though the extent of individual rights thereunder may be at times a factor in deter-

⁴⁹ *Murphy v. People of State of California*, 225 U.S. 623, 32 S.Ct. 697, 56 L.Ed. 1229, 41 L.R.A.,N.S., 153.

⁵⁰ The prohibition of the business of ticket scalping, for example, has been held both valid, *City of Chicago v. Oppenheim*, 229 Ill. 313, 82 N.E. 294, 11 Ann.Cas. 554; and invalid, *Ex parte Quarg*, 149 Cal. 79, 84 P. 766, 5 L.R.A.,N.S., 183, 117 Am.St. Rep. 115, 9 Ann.Cas. 747.

⁵¹ *Murphy v. People of State of California*, 225 U.S. 623, 32 S.Ct. 697, 56 L.Ed. 1229, 41 L.R.A.,N.S., 153.

⁵² *NOBLE STATE BANK v. HASKELL*, 219 U.S. 104, 31 S.Ct. 186, 55 L.Ed. 112, 32 L.R.A.,N.S., 1062, Ann. Cas.1912A, 487, Black's Cas. Constitutional Law, 2d, 410; *Shallemberger v. First State Bank of Holstein, Neb.*, 219 U.S. 114, 31 S.Ct. 189, 55 L.Ed. 117.

⁵³ *Dillingham v. McLaughlin*, 264 U.S. 370, 44 S.Ct. 362, 68 L.Ed. 742.

⁵⁴ *Commonwealth v. Vrooman*, 164 Pa. 306, 30 A. 217, 25 L.R.A. 250, 44 Am.St.Rep. 603.

mining the reasonableness of a legislative change therein.⁵⁵ The right to exist as a corporation is a franchise which a state may grant or refuse at will so far as due process considerations are concerned. It would, therefore, not violate due process to refuse incorporation for the purpose of conducting certain businesses or professions. It is conceivable that the grant of the privilege in some cases and not in others might be held violative of equal protection, but no case has been found deciding such an issue. The cases in which the power of a state to require incorporation for certain kinds of business have been sustained involved situations in which the opportunity to incorporate therefor was available to all on reasonable and equal terms. A different problem arises when a state restricts the right to engage therein to a limited class defined by reference to factors other than those intended to insure compliance with a reasonable standard of competence to engage in such business. The most extreme case of this kind is a governmental grant of a monopoly to conduct a certain business to a private person. The grant of exclusive franchises to operate public utilities has long been a common practise and does not violate either due process or equal protection.⁵⁶ It has also been held valid for a city to grant an exclusive privilege to collect all the garbage of its residents, and that competitors were not thereby deprived of any of their constitutional rights.⁵⁷ The monopoly in these cases is clearly in respect to a function which the municipalities themselves might legally perform. An expansion in the scope of permissible governmental activities may well entail an enlargement of the field within which government will be permitted to confer monopolistic privileges on private persons. It was held in a very early case that the grant of a monopoly of the slaughterhouse business to a private corporation did not violate any rights guaranteed those excluded from such business by the due process clause of the Fourteenth Amendment.⁵⁸ The business, however, was one bearing a close relation to the public health. The grant of such monopolies in the case of what are generally considered ordinary businesses or callings deprives those excluded therefrom of

⁵⁵ NOBLE STATE BANK v. HASKELL, 219 U.S. 104, 31 S.Ct. 186, 55 L.Ed. 112, 32 L.R.A.,N.S., 1062, Black's Cas. Constitutional Law, 2d, 410.

⁵⁶ See NEW STATE ICE CO. v. LIEBMANN, 285 U.S. 262, 52 S.Ct.

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371, 76 L.Ed. 747, Black's Cas. Constitutional Law, 2d, 416.

⁵⁷ California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306, 26 S.Ct. 100, 50 L.Ed. 204.

⁵⁸ Slaughter House Cases, 16 Wall. 36, 21 L.Ed. 394.

property without due process of law.⁵⁹ The power of a government itself to exercise a monopoly is at least as broad as its power to confer it upon private persons. It is as yet undetermined whether it can validly do so in cases in which the grant of a private monopoly would violate due process, equal protection, or both. Problems of this character will become especially important as government invades fields heretofore occupied by private enterprise, and as the scope of its regulation and planning of the community's economic life expands.⁶⁰

Regulation of Business by Licensing Systems

It has been judicially affirmed that a state is free, notwithstanding the due process and equal protection clauses, "to adopt whatever economic policy may reasonably be deemed to promote the public welfare, and to enforce that policy by legislation adapted to that purpose."⁶¹ It may, therefore, impose restrictions on the right to enter a business or profession if those restrictions are reasonable means for protecting or promoting the general welfare. A common form of regulation of this character is requiring a license as a condition precedent to pursuing certain businesses and professions. The essence of such a requirement is generally the necessity for procuring the consent of the state before a person may lawfully pursue the licensed business or calling. The due process clause permits a state to impose this condition upon the right to pursue practically all, if not all, the ordinary businesses and callings, even those that it could not validly prohibit absolutely. It has been sustained in the cases of such businesses as the operation of employment agencies,⁶² the operation of grain elevators,⁶³ the sale of agricultural products on commission,⁶⁴ the sale of securities,⁶⁵ the business of a pri-

⁵⁹ *NEW STATE ICE CO. v. LIEB-MANN*, 285 U.S. 262, 52 S.Ct. 371, 76 L.Ed. 747, Black's Cas. Constitutional Law, 2d, 416.

⁶⁰ State constitutions frequently contain specific provisions prohibiting the grant of special privileges and monopolies.

⁶¹ *NEBBIA v. NEW YORK*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469, Black's Cas. Constitutional Law, 2d, 441.

⁶² *Brazee v. People of State of*

Michigan, 241 U.S. 340, 36 S.Ct. 561, 60 L.Ed. 1034.

⁶³ *MUNN v. ILLINOIS*, 94 U.S. 113, 24 L.Ed. 77, Black's Cas. Constitutional Law, 2d, 434; *W. W. Cargill Co. v. State of Minnesota*, 180 U.S. 452, 21 S.Ct. 423, 45 L.Ed. 619.

⁶⁴ *State ex rel. Beek v. Wagener*, 77 Minn. 483, 80 N.W. 633, 778, 1134, 46 L.R.A. 442, 77 Am.St.Rep. 681.

⁶⁵ *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 37 S.Ct. 217, 61 L.Ed. 480, L.R.A.1917F, 514, Ann.Cas.1917C, 643.

vate detective,⁶⁶ the business of receiving and transmitting deposits,⁶⁷ and the small loan business.⁶⁸ It has also been held a valid requirement for such professions as those of the doctor,⁶⁹ the dentist,⁷⁰ optometrists⁷¹ and veterinarians.⁷² The reasoning on which the power to impose this requirement in those cases was based is broad enough to warrant the conclusion that the mere imposition of this requirement would in no case violate due process.⁷³

Resort to regulation by licensing must, like every other form of regulation, be reasonable if it is to be held consonant with the requirements of due process. This resolves itself in practise into an issue as to the reasonableness of the conditions with which an applicant must comply in order to obtain the state's consent. The exaction of a reasonable license fee not in excess of the reasonable costs of issuing the license and regulating the licensed business is valid.⁷⁴ The requirement of a purely regulatory fee in excess thereof in connection with a useful and harmless business would violate due process, but a prohibitive regulatory fee may be demanded for any business or calling which the state may prohibit.⁷⁵ It has, however, been held that the due process clause does not prevent a state from fixing the amount demanded for the right to pursue a business or calling with a view to both revenue and regulation,⁷⁶ and that it does

⁶⁶ *Lehon v. Atlanta*, 242 U.S. 53, 37 S.Ct. 70, 61 L.Ed. 145.

⁶⁷ *ENGEL v. O'MALLEY*, 219 U.S. 128, 31 S.Ct. 190, 55 L.Ed. 128, *Black's Cas. Constitutional Law*, 2d, 413.

⁶⁸ *People v. Stokes*, 281 Ill. 159, 118 N.E. 87; *Dewey v. Richardson*, 206 Mass. 430, 92 N.E. 708.

⁶⁹ *Douglas v. Noble*, 261 U.S. 165, 43 S.Ct. 303, 67 L.Ed. 590; *Graves v. State of Minnesota*, 272 U.S. 425, 47 S.Ct. 122, 71 L.Ed. 331.

⁷⁰ *Dent v. State of West Virginia*, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623.

⁷¹ *Ex parte Rust*, 181 Cal. 73, 183 P. 548.

⁷² *Pistole v. State*, 68 Tex.Cr.R. 127, 150 S.W. 618.

⁷³ There are, however, some cases treating the requirement of a permit to engage in certain callings as an invalid encroachment on the right to pursue a useful and harmless calling; see *Dasch v. Jackson*, 170 Md. 251, 183 A. 534; *Replogle v. Little Rock*, 166 Ark. 617, 267 S.W. 353, 36 A.L.R. 1333.

⁷⁴ *Gundling v. Chicago*, 177 U.S. 183, 20 S.Ct. 633, 44 L.Ed. 725.

⁷⁵ *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 36 S.Ct. 370, 60 L.Ed. 679, *L.R.A.1917A*, 421, *Ann.Cas.1917B*, 455; *Tanner v. Little*, 240 U.S. 369, 36 S.Ct. 379, 60 L.Ed. 691.

⁷⁶ *Gundling v. Chicago*, 177 U.S. 183, 20 S.Ct. 633, 44 L.Ed. 725; *Royall v. Virginia*, 116 U.S. 572, 6 S.Ct. 510, 29 L.Ed. 735.

not invalidate a tax merely because its amount is such as to prevent the continued operation of a business.⁷⁷ There is no precise test for determining whether a financial demand is an exercise of a state's police or taxing power other than the intention of the legislative body imposing it. The principle limiting its amount in the case of a useful and harmless business applies only where the exaction is an incident to its regulation. The possibility of treating it as in whole or in part referable to the taxing power may thus result in limiting the scope of the effective protection of the due process clause of the Fourteenth Amendment against the exaction of excessive monetary payments for the right to pursue useful and harmless businesses and callings.⁷⁸ It is also valid to require applicants for a license to pay a reasonable fee to cover the reasonable costs of such investigations as may be necessary to determine whether they meet the reasonable conditions to obtaining a license.⁷⁹ Licensees may also be required to give a reasonable bond, with or without sureties, for the protection of those dealing with them in their exercise of the licensed business or calling, or to insure compliance with any valid regulations of such business or calling.⁸⁰

The requirement of a license necessarily involves a control by the government of who shall be permitted to pursue the licensed business or calling. Its aim is the protection of the public against injuries that it might suffer from the conduct of such business or calling. The state may, therefore, impose any conditions precedent to the grant of its consent which have a real and substantial relation to that objective. It may prescribe that only those possessing the reasonably necessary qualifications for the pursuit of a business or calling shall be permitted to engage therein. The qualifications that may be deemed reasonably necessary for the protection of the public are as varied as the businesses and callings serving that public, and a requirement reasonable for one might be wholly unreasonable for another. It

⁷⁷ *A. MAGNANO CO. v. HAMILTON*, 292 U.S. 40, 54 S.Ct. 599, 78 L.Ed. 1109, Black's Cas. Constitutional Law, 2d, 556.

⁷⁸ The question whether a fee is a tax or an exercise of the police power arises frequently where it is exacted by a municipality having limited taxing powers only.

⁷⁹ *Wisconsin Tel. Co. v. Public Service Commission*, 206 Wis. 589, 240 N.W. 411; *Charlotte, C. & A. R. Co. v. Gibbes*, 142 U.S. 386, 12 S.Ct. 255, 35 L.Ed. 1051.

⁸⁰ *Juhan v. State*, 86 Tex.Cr.R. 63, 216 S.W. 873; *Packard v. Banton*, 264 U.S. 140, 44 S.Ct. 257, 68 L.Ed. 596.

is a reasonable measure for the protection of the public safety to require railroad employees connected with the operation of trains to be free from color blindness or other defects of vision.⁸¹ It would be clearly unreasonable to impose such a requirement upon accountants. The principal field for the application of these principles has been in prescribing minimum standards of professional competence for such professions as the practice of medicine,⁸² dentistry,⁸³ pharmacy,⁸⁴ optometry,⁸⁵ veterinary medicine,⁸⁶ law,⁸⁷ accountancy,⁸⁸ and many others. The state may validly require those wishing to pursue such professions to comply with such requirements as graduation from reputable schools giving instruction in the subject matter of those professions, training in fields of knowledge closely related thereto,⁸⁹ and the successful passing of examinations intended to test applicants as to their knowledge thereof.⁹⁰ The successful passing of examinations testing the fitness of applicants may also be validly required for trades and callings requiring special skills,⁹¹ but there have been cases involving trades requiring but little training and experience in which such a requirement has been held unreasonable.⁹² The extent to which prior experience may be made a condition precedent to the pursuit of a trade, or experience in one trade made a requirement of the right to pursue a related trade, depends on the reasonableness of such requirements and the degree to which the protection of legiti-

⁸¹ *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U.S. 96, 9 S.Ct. 28, 32 L.Ed. 352.

⁸² *Douglas v. Noble*, 261 U.S. 165, 43 S.Ct. 303, 67 L.Ed. 590; *Graves v. State of Minnesota*, 272 U.S. 425, 47 S.Ct. 122, 71 L.Ed. 331.

⁸³ *Dent v. State of West Virginia*, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623.

⁸⁴ *Indiana Board of Pharmacy v. Haag*, 184 Ind. 333, 111 N.E. 178.

⁸⁵ *Ex parte Rust*, 181 Cal. 73, 183 P. 548.

⁸⁶ *Pistole v. State*, 68 Tex.Cr.R. 127, 150 S.W. 618.

⁸⁷ *Bradwell v. Illinois*, 16 Wall. 130, 21 L.Ed. 442.

⁸⁸ *Lehmann v. State Board of Public Accountancy*, 208 Ala. 185, 94 So. 94; cf. *Frazer v. Shelton*, 320 Ill. 253, 150 N.E. 696, 43 A.L.R. 1086.

⁸⁹ *Douglas v. Noble*, 261 U.S. 165, 43 S.Ct. 303, 67 L.Ed. 590.

⁹⁰ *Douglas v. Noble*, *supra*, note 89.

⁹¹ *Singer v. Maryland*, 72 Md. 464, 19 A. 1044, 8 L.R.A. 551; *Douglas v. People ex rel. Ruddy*, 225 Ill. 536, 80 N.E. 341, 8 L.R.A., N.S., 1116, 116 Am.St.Rep. 162; *State v. Walker*, 48 Wash. 8, 92 P. 775, 15 Ann.Cas. 257; *Smith v. State of Alabama*, 124 U.S. 465, 8 S.Ct. 564, 31 L.Ed. 508.

⁹² *Dasch v. Jackson*, 170 Md. 251, 183 A. 534; *Replogle v. Little Rock*, 166 Ark. 617, 267 S.W. 353, 36 A.L.R. 1333.

mate public interests justifies them. Thus it has been held unreasonable to require that conductors on passenger trains should have served two years as conductors on freight trains or as brakemen,⁹³ while it has been held not invalid to require a two years course of study and practice before a student of barbering can become a public barber.⁹⁴

There are numerous businesses for whose pursuit due process permits the imposition of character and fitness requirements. It has been held valid to condition the right to a license to sell cigarettes on a finding by the licensing authority that the applicant was a person of good character and reputation and a suitable person to be entrusted with their sale.⁹⁵ The grant of a license to sell securities may be limited to persons of good business repute.⁹⁶ Statutes for licensing real estate brokers that restricted the grant of licenses to those bearing a good reputation for honesty and fair dealing involve no invalid restriction on the right to pursue a lawful calling.⁹⁷ The right to engage in banking may be limited to those whose character and general fitness justifies the belief that the business will be honestly and efficiently conducted.⁹⁸ Similar qualifications may be demanded of those applying for licenses to engage in the small loan business.⁹⁹ The basis for sustaining most of these requirements was the protection of the public against losses from fraud and incompetence. Similar requirements may, however, be imposed to protect the public against any evils likely to result from the conduct of any business by unfit persons or those of bad character.¹

The power to impose reasonable conditions on the right to pursue a business or profession includes that of excluding those

⁹³ *Smith v. State of Texas*, 283 U. S. 630, 34 S.Ct. 681, 58 L.Ed. 1129, L.R.A.1915D, 677, Ann.Cas.1915D, 420.

⁹⁴ *Moler v. Whisman*, 243 Mo. 571, 147 S.W. 985, 40 L.R.A., N.S., 629, Ann.Cas.1913D, 392.

⁹⁵ *Gundling v. Chicago*, 177 U.S. 183, 20 S.Ct. 633, 44 L.Ed. 725.

⁹⁶ *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 37 S.Ct. 217, 61 L.Ed. 480, L.R.A.1917F, 514, Ann.Cas. 1917C, 643.

⁹⁷ *Hoblitzel v. Jenkins*, 204 Ky.

122, 263 S.W. 764; *Riley v. Chambers*, 181 Cal. 589, 185 P. 855, 8 A.L.R. 418.

⁹⁸ *Weer v. Page*, 155 Md. 86, 141 A. 518.

⁹⁹ *Ex parte Halck*, 215 Cal. 500, 11 P.2d 389; *Beneficial Loan Soc. v. Haight*, 215 Cal. 506, 11 P.2d 857; *Ravitz v. Steurele*, 257 Ky. 108, 77 S.W.2d 360.

¹ *State ex rel. Altop v. Billings*, 79 Mont. 25, 255 P. 11, 54 A.L.R. 1091; *People v. Harley*, 230 Mich. 676, 203 N.W. 531.

who cannot meet those conditions.² The normal result of such exclusion of applicants for a license or permit is the lessening of competition in the regulated business or profession. The extent to which a state may adopt that as a direct objective by conditioning the grant of a license on proof of the fact that allowing an applicant to engage in a business will promote the convenience and advantage of the community in which he wishes to conduct it, must be regarded as a still unsettled problem. The right to enter the public utility field or that of businesses affected with a public interest, and the right of those already engaged therein to expand their services and facilities, may be conditioned on proof that public convenience and necessity will be promoted thereby. The imposition of similar requirements has, moreover, been held not violative of due process in the case of at least some businesses not includible within the technical category of those affected with a public interest. It has been held valid to require it for contract carriers as a reasonable method for conserving the state's highway system although its principal purpose was the protection of common carriers within the state against the excessive competition of contract carriers.³ State statutes requiring private carriers to procure such certificate before operating as such have been sustained against objections based on the due process and equal protection clauses.⁴ The state may deny the right to engage in banking if there exists no reasonable public demand for a bank in the locality in which it is proposed to operate.⁵ It has been held that a statute limiting the number of permits to sell cigarettes that might be issued does not deny either due process or equal protection to those denied such permits because the permissible number had been exhausted. The limitation of the number of permittees was held to be a reasonable means for rendering effective the prohibition against sales to minors.⁶ There are, however, cases holding that it violates one or both of those constitutional

² *Gant v. Oklahoma City*, 289 U.S. 98, 53 S.Ct. 530, 77 L.Ed. 1058.

³ *Stephenson v. Binford*, 287 U.S. 251, 53 S.Ct. 181, 77 L.Ed. 288, 87 A.L.R. 721.

⁴ *Rutledge Co-op. Ass'n v. Baughman*, 153 Md. 297, 138 A. 29, 56 A.L.R. 1042; *Barbour v. Walker*, 126 Okl. 227, 259 P. 552, 56 A.L.R. 1049; *Georgia Public Service Commission*

v. Saye & Davis Transfer Co., 170 Ga. 873, 154 S.E. 439.

⁵ *State ex rel. Dybdal v. State Securities Commission*, 145 Minn. 221, 176 N.W. 759; *Schaake v. Dolley*, 85 Kan. 598, 118 P. 80, 37 L.R.A., N.S., 877, Ann.Cas.1913A, 254.

⁶ *Ford Hopkins Co. v. Iowa City*, 216 Iowa 1286, 248 N.W. 668.

provisions to impose such conditions on the right to engage in what are called ordinary businesses. It may not be required for a license to operate an employment agency.⁷ The leading case against the validity of such a requirement is *New State Ice Co. v. Liebmann*,⁸ which held that the right to engage in the manufacture and sale of artificial ice could not validly be denied merely because the existing licensed facilities were adequate to meet the needs of the community in which the applicant for a permit proposed to operate. The ultimate basis for the decision was the view that said business was an ordinary business not manifesting any of the characteristics of businesses affected with a public interest. The implication that this form of protection against what the legislature may believe to be the public evils of excessive competition is limited to businesses within the technical category of those affected with a public interest is inconsistent with some of the decisions herein discussed. It is still undetermined whether the change in that conception made in the case of *Nebbia v. New York*⁹ to denote any business subject to control for the public good has involved an implied reversal of *New State Ice Co. v. Liebmann* and the removal of that artificial and conceptual limitation on the scope of businesses in which the state may regulate the competitive system by limiting the number of the competitors. The only generalization that adequately recognizes all the decisions on this matter is that limitation of the right to pursue a business or profession in order to restrict the number of competitors therein does not violate the due process clause if it is a reasonable means for promoting an objective which a state may validly promote or for dealing with an evil which the legislature reasonably believes due to excessive competition. A state is not, however, permitted to grant exemptions from such a system of regulation unless they can be justified on the basis of the principles defining what constitute reasonable classifications within the equal protection clause. It has, accordingly, been held invalid to exempt a corporation operating a cotton gin for profit from such requirement while subjecting individuals thereto even though the corporation had some of the features of a co-operative venture.¹⁰

⁷ *Engberg v. Debel*, 194 Minn. 394, 260 N.W. 626.

⁸ 285 U.S. 262, 52 S.Ct. 371, 76 L. Ed. 747.

⁹ 291 U.S. 502, 54 S.Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469.

¹⁰ *Frost v. Corporation Commission of Oklahoma*, 278 U.S. 515, 49 S.Ct. 235, 73 L.Ed. 483; *Corporation Commission of Oklahoma v. Lowe*, 281 U.S. 431, 50 S.Ct. 397, 74 L.Ed. 945.

The same case stated that an exemption of true co-operatives would have been valid.

The general principles governing the right to revoke a permit or license to pursue a business or profession are the same as those applicable to their grant. It is an exercise of the police power which is subject to the same constitutional standard of reasonableness as is any other exercise thereof. The causes of revocation must be reasonable.¹¹ The standard of reasonableness is easily met in the cases of businesses or professions which could be absolutely prohibited.

The power to grant or revoke permits and licenses is usually conferred upon an administrative official or board. It is generally impossible to state the conditions on which a license shall be granted or revoked in language so definite as to exclude the exercise of discretion by the licensing authority. Conferring discretionary power on administrative officials to grant, withhold or revoke licenses to carry on a business or profession does not in itself violate due process.¹² It is only where the statute confers upon such officials arbitrary powers in these matters, or where a validly conferred discretion is arbitrarily exercised, that the requirements of due process and equal protection are violated.¹³ These are the principles applicable when the regulated business is one that cannot be wholly prohibited. Where it is one that a state could completely prohibit, such as that of selling intoxicants, the grant or refusal or revocation of a license may be made to depend on a much less definitely circumscribed administrative discretion than in the case of the former class of businesses.¹⁴ The question of whether an arbitrary administrative discretion has, or has not, been conferred depends upon whether the legislature has laid down a sufficiently definite standard to guide the administrator in exercising his discretion. This is a problem very similar to that of whether the grant of such discretion has delegated legislative, or conferred judicial, power upon such administrator. The degree of definiteness required depends to a considerable extent upon the degree to which a valid test lends itself to precise definition, and upon

¹¹ *Mandel v. Board of Regents, of University of New York*, 250 N.Y. 173, 164 N.E. 895; *People ex rel. v. Apfelbaum*, 251 Ill. 18, 95 N.E. 995.

¹² *People of State of New York ex*

rel. Lieberman v. VanDeCarr, 199 U. S. 552, 26 S.Ct. 144, 50 L.Ed. 305.

¹³ *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220.

¹⁴ *Crowley v. Christensen*, 137 U. S. 86, 11 S.Ct. 13, 34 L.Ed. 620.

the necessities of efficient administration. Statutes limiting the grant of licenses to practise medicine or dentistry to persons of good moral character and graduates of reputable medical or dental schools,¹⁵ those conditioning the right to pursue given businesses on proof that the character, responsibility and general fitness of applicants for a license are such as to command confidence and to warrant the belief that the business will be honestly conducted or that the applicants possess a good repute in business,¹⁶ and those conditioning the grant of licenses to cases in which public convenience and necessity or public advantage and convenience will be promoted thereby,¹⁷ have been sustained as establishing a sufficiently definite standard to escape condemnation for violation of the due process clause. Ordinances requiring permits from municipal councils for the sale of milk, or establishing dairy stables, within a city have been sustained although prescribing no specific standards because they were construed as not vesting arbitrary power in the licensing body.¹⁸ The issue in cases of that character involves the extent of discretion that may validly be conferred upon administrative officials in applying the law in individual cases. The issue is somewhat different when the statute or ordinance confers upon such officials discretion in defining the qualifications which applicants must meet. This occurs when they are authorized to determine the subjects of which one must have knowledge in order to be fit to practice a profession, the extent of the requisite knowledge in each subject, or the requisite degree of skill. The general principles employed for determining the consonance of such a grant of power with the requirements of due process are the same as those involved in determining whether arbitrary power has been conferred in applying a license requirement in

¹⁵ *Douglas v. Noble*, 261 U.S. 165, 43 S.Ct. 303, 67 L.Ed. 590; *Graves v. State of Minnesota*, 272 U.S. 425, 47 S.Ct. 122, 71 L.Ed. 331.

¹⁶ *Gundling v. Chicago*, 177 U.S. 183, 20 S.Ct. 633, 44 L.Ed. 725; *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 37 S.Ct. 217, 61 L.Ed. 480, L.R.A.1917F, 514, Ann.Cas.1917C, 643; *State ex rel. Altop v. Billings*, 79 Mont. 25, 255 P. 11, 54 A.L.R. 1091; *Weer v. Page*, 155 Md. 86, 141 A. 518; *Beneficial Loan Soc. v. Haight*, 215 Cal. 506, 11 P.2d 857.

¹⁷ *State v. Darazzo*, 97 Conn. 728, 118 A. 81; *In re James*, 99 Vt. 265, 132 A. 40; *State ex rel. Dybdal v. State Securities Commission*, 145 Minn. 221, 176 N.W. 759; *Weer v. Page*, 155 Md. 86, 141 A. 518; *Schaafe v. Dolley*, 85 Kan. 598, 118 P. 80, 37 L.R.A., N.S., 877, Ann.Cas. 1913A, 254.

¹⁸ *People of State of New York ex rel. Lieberman v. VanDeCarr*, 199 U.S. 552, 26 S.Ct. 144, 50 L.Ed. 305; *Fischer v. City of St. Louis*, 194 U.S. 361, 24 S.Ct. 673, 48 L.Ed. 1018.

individual cases. Due process is not violated if the legislature has prescribed an intelligible and reasonably definite standard within which the administrators must exercise their discretion.¹⁹ The legislature may, after it itself has prescribed the general standard of fitness and clearly indicated the character and scope of such examinations, confer upon administrators the power to fill in the details reasonably necessary to translate the general principles into an effective administrative tool for the accomplishment of the results aimed at by the legislature.²⁰ The arbitrary application of even a validly defined standard is a violation of the due process clause.²¹

The power of a state to protect the public interest through imposing conditions on the right to engage in a business or profession may not be exercised by requiring compliance with conditions having no reasonable relation to that objective. A statute requiring every pharmacy or drug store to be owned by a licensed pharmacist, and, in the case of corporations and partnerships, requiring every member or partner to be a licensed pharmacist, bears no real and substantial relation to the public health, and deprives the owners of such a business who were not licensed pharmacists of their property without due process of law.²² The protection of the public may require the limitation of the right to compound prescriptions and to sell dangerous drugs to qualified persons, but the claim that the ownership of a drug store by one not a pharmacist bore a reasonable relation to the public health was held too unsupported by evidence and too insubstantial to justify so extreme a requirement. The provision was but one of a broad legislative plan for regulating the prescription and sale of drugs and medicines which included many provisions amply safeguarding the public health, and this was a factor that influenced the Court in reaching its judgment. It cannot, however, be inferred therefrom that the provision held invalid would have been sustained had it stood alone. It is quite probable that it will require an unusual situation in order to justify legislation limiting the right to own a business consisting in part of rendering professional services to licensed members of such profession, although a state could validly refuse to permit corporations to be organized to render such

¹⁹ Douglas v. Noble, 261 U.S. 165, 43 S.Ct. 303, 67 L.Ed. 590.

²⁰ Douglas v. Noble, *supra*, note 19.

²¹ Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220.

²² Louis K. Liggett Co. v. Baldridge, 278 U.S. 105, 49 S.Ct. 57, 73 L.Ed. 204.

services. Legislation limiting to licensed members of a profession the right to perform acts incidental to the customary practice thereof but not requiring any professional competence is usually held to violate the due process clause. It has, accordingly been held invalid to limit to licensed pharmacists the right to sell all articles listed in the United States Pharmacopoeia or National Formulary, or all drugs, including patent medicines.²³ It was held that this was not a health measure but an attempt to confer a monopoly upon the favored group. Statutes requiring all sales of medicines sold in their original packages, other than patent or proprietary medicines, to be made by or under the direction or in the presence of a registered pharmacist have, however, been held not to violate the due process clause.²⁴ The right to limit to licensed persons the performance of any professional act requiring special skill or professional competence is almost universally sustained as consistent with due process. The foregoing cases show a judicial reluctance to extend the scope of the protection afforded by a license to include acts in connection with which such skill or competence is not required for the protection of the public interest. Many a covert attempt to secure a partial monopoly at public expense has been frustrated by this judicial attitude.

Regulating Methods of Conducting Business

A state may exercise its police power not only to determine who shall be permitted to pursue businesses and professions but also to regulate the manner in which they may be conducted. Due process requires only that the regulations be reasonable, and the equal protection clause requires only that there be no unreasonable discrimination in establishing and executing the regulations. The number and variety of such regulations are such as to defy exhaustive treatment. A state has a wide discretion in determining the character of its economic system and institutions. The common law has in general favored a competitive system, and it was, therefore, practically inevitable that legislation aimed at its maintenance should be sustained against objections based on the due process clause. Statutes that invalidate agreements and combinations to fix prices, to divide a trade area among competitors, or tending to stifle competition and to promote monopoly, are not an unconstitutional invasion

²³ State v. Geest, 118 Neb. 562, 225 N.W. 709; State v. Wood, 51 S.D. 485, 215 N.W. 487, 54 A.L.R. 719.

²⁴ Ex parte Gray, 206 Cal. 497, 274 P. 974; State v. Levine, 173 Minn. 322, 217 N.W. 342.

of the freedom of contract guaranteed by the due process clauses.²⁵ It is also valid to prohibit a person from acquiring corporate shares, and from voting those already owned, insofar as such acts are parts of a plan for establishing a monopoly.²⁶ Retailers may be forbidden to enter into agreements for the boycotting of wholesalers and producers selling directly to the general public.²⁷ A state may also protect competition by forbidding unfair methods of competition such as charging lower prices in one locality than those exacted in another,²⁸ giving trade inducements to purchasers,²⁹ and other forms of price discrimination.³⁰ The theory of the desirability and the adequacy of competition to protect the public interest has been frequently denied. The due process clause of the Fourteenth Amendment does not prevent a state from so legislating as to permit or even promote monopolistic business practices. It has already been stated that it does limit the state in granting private monopolies, but that does not imply that it may not legalize contracts between private persons that restrict competition. It may validly forbid vendors to impose conditions on vendees whose aim is to limit competition.³¹ It is, however, equally valid for it to permit a vendor of trade-marked goods to fix their resale price by contract with the vendee, and to protect this right by making it an actionable form of unfair competition for any person, whether or not a party to such contract, to knowingly sell or advertise such goods for sale under their trade mark at any price other than that so fixed.³²

²⁵ *Grenada Lumber Co. v. State of Mississippi*, 217 U.S. 433, 30 S.Ct. 535, 54 L.Ed. 826; *Commonwealth v. Strauss*, 191 Mass. 545, 78 N.E. 136, 11 L.R.A.,N.S., 968, 6 Ann.Cas. 842; *National Cotton Oil Co. v. State of Texas*, 197 U.S. 115, 25 S.Ct. 379, 49 L.Ed. 689; *Waters-Pierce Oil Co. v. State of Texas*, 212 U.S. 86, 29 S.Ct. 220, 53 L.Ed. 417.

²⁶ *Northern Securities Co. v. United States*, 193 U.S. 197, 24 S.Ct. 436, 48 L.Ed. 679.

²⁷ *Grenada Lumber Co. v. Mississippi*, 217 U.S. 433, 30 S.Ct. 535, 54 L.Ed. 826.

²⁸ *Central Lumber Co. v. State of South Dakota*, 226 U.S. 157, 33 S.Ct. 66, 57 L.Ed. 164; cf. *Fairmont*

Creamery Co. v. State of Minnesota, 274 U.S. 1, 47 S.Ct. 506, 71 L.Ed. 893, 52 A.L.R. 163.

²⁹ *Rast v. VanDeman & Lewis Co.*, 240 U.S. 342, 36 S.Ct. 370, 60 L.Ed. 679, L.R.A.1917A, 421, Ann.Cas. 1917B, 455.

³⁰ *Van Camp & Sons v. American Can Co.*, 278 U.S. 245, 49 S.Ct. 112, 73 L.Ed. 311, 60 A.L.R. 1060.

³¹ *Commonwealth v. Strauss*, 191 Mass. 545, 78 N.E. 136, 11 L.R.A.,N.S., 968, 6 Ann.Cas. 842.

³² *OLD DEARBORN DISTRIBUTING CO. v. SEAGRAM-DISTILLERS CORP.*, 299 U.S. 183, 57 S.Ct. 139, 81 L.Ed. 109, 106 A.L.R. 1476, *Black's Cas. Constitutional Law*, 2d, 424.

Legislation of this character has been justified not only as a reasonable protection of a trade mark but also as a reasonable means for protecting the public against the effects of price cutting as a form of competition. The latter reasoning is broad enough to justify the inference that legislation of this character would be valid even in the case of goods not sold under a trade mark or trade name. A state is, however, limited by the requirements of the equal protection clause in determining the kind of economic institutions which it wishes to promote. It may not grant arbitrary exemptions from legislation invalidating contracts in restraint of trade. It was held in a rather early case that the exemption of agricultural products and livestock while in the hands of the producer or raiser from the provisions of an anti-monopoly statute violated the equal protection clause.³³ The case would probably be decided differently today. The exemption of combinations of purchasers of commodities and of laborers from the provisions of a state anti-trust law has been held not to deny those within the statute the equal protection of the laws.³⁴ Nor is that constitutional provision violated by a failure to extend to all commodities the protection against price cutting accorded goods sold under a trade mark or a trade name.³⁵ A state may, in order to promote the development of co-operative associations for the marketing of agricultural products, accord contracts between such associations and their members a degree of legal protection not accorded other contracts by subjecting those who knowingly induce their breach to heavy penalties.³⁶ It has also been stated that non-profit co-operatives may validly be exempted from a burdensome condition precedent to procuring a license to operate a cotton gin which was imposed on all other applicants for such a license.³⁷ A state may also adjust its measures for preventing the evils of monopoly to the exigencies presented by the situation prevailing in a given business by confining to it a prohibition against agreements in regard to

³³ *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, 22 S.Ct. 431, 46 L.Ed. 679.

139, 81 L.Ed. 109, 106 A.L.R. 1476, *Black's Cas. Constitutional Law*, 2d, 424.

³⁴ *International Harvester Co. v. State of Missouri ex inf. Attorney General*, 234 U.S. 199, 34 S.Ct. 859, 55 L.Ed. 1276, 52 L.R.A., N.S., 525.

³⁶ *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Marketing Ass'n*, 276 U.S. 71, 48 S.Ct. 291, 72 L.Ed. 473.

³⁵ *OLD DEARBORN DISTRIBUTING CO. v. SEAGRAM-DISTILLERS CORP.*, 299 U.S. 183, 57 S.Ct.

³⁷ *Frost v. Corporation Commission of Oklahoma*, 278 U.S. 515, 49 S.Ct. 235, 73 L.Ed. 483.

prices which is not generally applied to other businesses.³⁸ Competition by the state itself as a method for protecting the public against the evils of private economic enterprise does not violate due process.³⁹

A state may use its regulatory powers to protect the public against any evils which experience has shown likely to result from the manner of conducting a business or profession. There has been enacted a great body of legislation aimed at the protection of the public in their dealings with those engaged in business or a profession. It is valid to protect their health by requiring articles sold to conform to proper standards.⁴⁰ This is one of the factors justifying pure food and drug acts. The courts have also sustained numerous laws intended to protect the public from being defrauded and imposed upon such as those requiring articles to be properly labelled,⁴¹ prohibiting the sale of articles under names that might convey a wrong impression as to their composition,⁴² prohibiting the sale of articles except in packages of prescribed sizes,⁴³ and prescribing the sizes for loaves of bread to be sold to the public.⁴⁴ Disclosure of contents on a label may be required even though the article is produced in accordance with a secret formula and contains no injurious ingredients.⁴⁵ The character of permissible advertising may be prescribed not only to protect the public against fraud but also to prevent a

³⁸ *Carroll v. Greenwich Ins. Co.*, 199 U.S. 401, 26 S.Ct. 66, 50 L.Ed. 246.

³⁹ *Madera Waterworks v. Madera*, 228 U.S. 454, 33 S.Ct. 571, 57 L.Ed. 915; *Mutual Oil Co. v. Zehrung*, D. C., 11 F.2d 887.

⁴⁰ *State v. Schlenker*, 112 Iowa 642, 84 N.W. 698, 51 L.R.A. 347, 84 Am. St.Rep. 360; *State v. Crescent Creamery Co.*, 83 Minn. 284, 86 N.W. 107, 54 L.R.A. 466, 85 Am.St.Rep. 464; *People v. Bowen*, 182 N.Y. 1, 74 N.E. 489; *Hebe Co. v. Shaw*, 248 U.S. 297, 39 S.Ct. 125, 63 L.Ed. 255.

⁴¹ *Corn Products Refining Co. v. Eddy*, 249 U.S. 427, 39 S.Ct. 325, 63 L.Ed. 689; *Heath & Milligan Mfg. Co. v. Worst*, 207 U.S. 338, 28 S.Ct. 114, 52 L.Ed. 236.

⁴² *Hutchinson Ice Cream Co. v. State of Iowa*, 242 U.S. 153, 37 S.Ct. 28, 61 L.Ed. 217, Ann.Cas.1917B, 643.

⁴³ *Armour & Co. v. State of North Dakota*, 240 U.S. 510, 36 S.Ct. 440, 60 L.Ed. 771, Ann.Cas.1916D, 548; *State v. Co-operative Store Co.*, 123 Tenn. 399, 131 S.W. 867, Ann.Cas. 1912C, 248.

⁴⁴ *Schmidinger v. City of Chicago*, 226 U.S. 578, 33 S.Ct. 182, 57 L.Ed. 364, Ann.Cas.1914B, 284; *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 44 S.Ct. 412, 68 L.Ed. 813, 32 A.L.R. 661; *Petersen Baking Co. v. Bryan*, 290 U.S. 570, 54 S.Ct. 277, 78 L.Ed. 505, 90 A.L.R. 1285.

⁴⁵ *Corn Products Refining Co. v. Eddy*, 249 U.S. 427, 39 S.Ct. 325, 63 L.Ed. 689.

lowering of the standards of a profession serving the public.⁴⁶ A statute making it a crime to maintain a place for the sale of corporate securities or commodities where the thing purchased is not delivered and paid for at the time the contract of sale is made unless the seller delivers a memorandum of sale to the purchaser at the time the contract is made does not deny due process, nor does it violate the equal protection clause because not extended to all sales.⁴⁷ A prohibition against purchasers on a board of trade continuing a custom long maintained thereon of deducting specified amounts from the actual weight of commodities sold thereon is a valid regulation to prevent unfair business practices.⁴⁸ It is only when a regulation exceeds the bounds of the reasonable that it violates due process. It has, for example, been held unreasonable to prohibit the use of shoddy in the manufacture of comfortables on the score that that measure went far beyond what was necessary to protect the general health and to prevent the public from being defrauded.⁴⁹ The line that separates the reasonable from the unreasonable is frequently an exceedingly fine one. Thus slight variations in the tolerances permitted by two statutes prescribing the size of loaves of bread, and differences between them in respect of the time during which the minimal weights had to be maintained, were a sufficient basis, in the light of the factual surroundings of the problem with which the legislation dealt, for a difference in the decision as to their validity under the due process clause of the Fourteenth Amendment.⁵⁰

The power to regulate a business or profession is not, however, limited to protecting that part of the public dealing directly with them. They may be regulated to protect the interests of others or to promote any valid governmental policy. It is not necessary to give more than a few illustrations of this principle. A state may validly prohibit the conduct of certain businesses or industries within specified areas where their operation might en-

⁴⁶ *SEMLER v. OREGON STATE BOARD OF DENTAL EXAMINERS*, 294 U.S. 608, 55 S.Ct. 570, 79 L.Ed. 1086, Black's Cas. Constitutional Law, 2d, 421.

⁴⁷ *Broadnax v. State of Missouri*, 219 U.S. 285, 31 S.Ct. 238, 55 L.Ed. 219.

⁴⁸ *House v. Mayes*, 219 U.S. 270, 31 S.Ct. 234, 55 L.Ed. 213.

⁴⁹ *Weaver v. Palmer Bros. & Co.*, 270 U.S. 402, 46 S.Ct. 320, 70 L.Ed. 654.

⁵⁰ Cf. *Jay Burns Baking Co. v. Bryan*, *supra*, note 44 with *Petersen Baking Co.*, *supra*, note 44.

danger the public health or safety.⁵¹ An ordinance prohibiting the operation of a business, such as that of a laundry, between specified hours of the night does not deprive those affected thereby of their property without due process of law, or deny to them the equal protection of the law, where the circumstances show it to be a reasonable precaution against public injury from fires.⁵² The keeping of a dairy or cow stable within the limits of a city except with the consent of public authorities may be validly prohibited,⁵³ and the prohibition of the maintenance of a cemetery within a city's limits has been held not to deprive owners of property within those limits which was available for such use of their property without due process of law.⁵⁴ It has been held valid to protect railway passengers from inconvenience and annoyance by forbidding soliciting their patronage for hotels, baths and doctors aboard trains.⁵⁵ The validity of legislation providing for the guarantee of bank deposits has been justified not only as a means for the protection of depositors, but also as a reasonable method for promoting the general economic welfare by preventing the breakdown of the currency system in actual use within the state.⁵⁶ The due process clauses do not confer upon those who practise a profession a right to exercise their professional discretion free from legislative interference. It has, accordingly, been held not violative of due process to prohibit a physician from prescribing intoxicating malt liquors for medicinal purposes,⁵⁷ and to limit the amount of spirituous and vinous liquors a physician might prescribe therefor.⁵⁸ The basis for these holdings was not the protection of patients but rather the promotion of the policy of prohibiting the manufacture and sale of

⁵¹ *Reinman v. City of Little Rock*, 237 U.S. 171, 35 S.Ct. 511, 59 L.Ed. 900; *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348, Ann.Cas.1917B, 927.

⁵² *Barbier v. Connolly*, 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923.

⁵³ *Fischer v. City of St. Louis*, 194 U.S. 361, 24 S.Ct. 673, 48 L.Ed. 1018.

⁵⁴ *Laurel Hill Cemetery v. City and County of San Francisco*, 216 U.S. 358, 30 S.Ct. 301, 54 L.Ed. 515.

⁵⁵ *Williams v. State of Arkansas*,
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217 U.S. 79, 30 S.Ct. 493, 54 L.Ed. 673, 18 Ann.Cas. 865.

⁵⁶ *NOBLE STATE BANK v. HASKELL*, 219 U.S. 104, 31 S.Ct. 186, 55 L.Ed. 112, 32 L.R.A.,N.S., 1062, Black's Cas. Constitutional Law, 2d, 410.

⁵⁷ *James Everard's Breweries v. Day*, 265 U.S. 545, 44 S.Ct. 628, 68 L.Ed. 1174.

⁵⁸ *Lambert v. Yellowley*, 2 Cir., 4 F.2d 915, affirmed but without discussing due process point, 272 U.S. 581, 47 S.Ct. 210, 71 L.Ed. 422, 49 A.L.R. 575.

intoxicants for beverage purposes. It can safely be stated that the due process clauses permit government to subject any business, profession or calling to any reasonable regulation to protect not only those who deal directly with them but also the general public insofar as their conduct impinges upon its interests.

Regulation of Prices of Goods and Services

The principal function of business enterprise is the sale of goods or services to the general public at a price. It has been the general practice in modern times to permit that price to be set by the vendor, and to rely upon the forces of competition to protect the public against excessive prices. It was that system which was in force at the time of the adoption of the Constitution and which has prevailed to a large extent ever since. It represented a reaction from a more intensively regulated economic system in which governmental price fixing had played a prominent part. The transition to a freer economic order appears never to have involved the complete disappearance of governmental price regulation and price fixing. The power of the several governments of our constitutional system to regulate and fix prices in the field of private economic activities was not questioned on constitutional grounds until the last quarter of the nineteenth century when its exercise by the states was challenged as violative of several provisions of the federal Constitution. The principal basis for the claim of unconstitutionality was the due process clause of the Fourteenth Amendment, and this has continued to be the main obstacle to the expansion of the field within which states may regulate and fix prices. The due process clause of the Fifth Amendment operates to limit the federal government in regulating and fixing prices within field of its delegated powers.

The principal purpose for which governmental price fixing has been invoked during the period since its revival in the United States has been the protection of the consumer of goods or services against excessive prices. The common law itself had developed the principle of the reasonable price as the maximum price permitted to be charged by those enjoying a legally protected monopoly, but that law is not the measure of the constitutionally permissible in this field. The power of the states to fix prices was first sustained against the claim that it deprived the owner of the property employed in rendering the service of property without due process of law in *Munn v. Illinois* which involved a statute regulating the price of grain elevation at com-

mercial centers.⁵⁹ This was soon followed by sustaining it as applied to the same business in a predominantly agricultural state where the conditions under which it was conducted were radically different and lacked such elements as virtual monopoly which had been among those adduced to support the statute in the *Munn Case*.⁶⁰ The power to fix railroad rates was definitely determined at about the same time.⁶¹ It has since then been firmly established that the mere governmental fixing of maximum prices does not violate due process as applied to stockyards,⁶² the carrying of oil by pipe lines,⁶³ and to such recognized public utility services as are furnished by telephone and telegraph companies,⁶⁴ and gas,⁶⁵ water,⁶⁶ and lighting companies.⁶⁷ The principal formal test of the liability of a business to legislative price-fixing developed in the early cases was the devotion of property used therein to the public use or its affectation with a public interest. This test was subsequently reformulated so as to make the formal factor the affectation of the business itself with the public interest, thereby eliminating any implication that legislative price-fixing was constitutionally limited to cases in which the regulated subject was the use of property. The change was definitely made in the decision sustaining the legislative fixing of insurance rates.⁶⁸ The presence of this formal factor was held to justify, as its absence was held to invalidate, price regulation for any given business. It was its absence that was held to invalidate a state's attempt to fix the fee chargeable by theatre ticket brokers,⁶⁹ the fee charge-

⁵⁹ 94 U.S. 113, 24 L.Ed. 77.

⁶⁰ *Brass v. State of North Dakota*, 153 U.S. 391, 14 S.Ct. 857, 38 L.Ed. 757.

⁶¹ *Peik v. Chicago & N. W. R. Co.*, 94 U.S. 164, 24 L.Ed. 97.

⁶² *Cotting v. Kansas City Stock Yards Co.*, 183 U.S. 79, 22 S.Ct. 30, 46 L.Ed. 92.

⁶³ *The Pipe Line Cases, United States v. Ohio Oil Co.*, 234 U.S. 548, 34 S.Ct. 956, 58 L.Ed. 1459.

⁶⁴ *Western Union Tel. Co. v. Myatt*, C.C., 98 F. 335.

⁶⁵ *Cleveland Gaslight & Coke Co. v. Cleveland, C.C.*, 71 F. 610.

⁶⁶ *Spring Valley Waterworks v. Schottler*, 110 U.S. 347, 4 S.Ct. 48, 28 L.Ed. 173.

⁶⁷ *Southern Oklahoma Power Co. v. Corporation Commission*, 96 Okl. 53, 220 P. 370.

⁶⁸ *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 34 S.Ct. 612, 58 L.Ed. 1011, L.R.A.1915C, 1189.

⁶⁹ *Tyson & Bro. United Theatre Ticket Offices v. Banton*, 273 U.S. 418, 47 S.Ct. 426, 71 L.Ed. 718, 58 A.L.R. 1236.

able by employment agencies,⁷⁰ and the price of gasoline,⁷¹ even as an incident to a general plan for the control and licensing of those businesses. The test has been employed as one of inclusion within, and exclusion from, the field of governmental price control whether the subject of the regulation was a commodity or a service. The formal test, however, gives no indication of the material factors that make a business or service one affected with a public interest. These are to be found, except in the case of historical survivals, in the character of the business, the conditions under which it is conducted, its importance to the general public interest, and the effects of its activities upon the general welfare. The grant of a legal monopoly or special privileges is a fact on which the requisite public interest can be predicated.⁷² The existence of a factual or virtual monopoly in a business performing an indispensable service to the nation's commerce, or in one that is a practical necessity to business activity, has been made the judicial basis for holding them subject to legislative price-fixing.⁷³ It is not necessary that there be complete monopoly; it is sufficient if the conditions under which the business is conducted give those engaged therein an undue coercive control over the prices charged consumers or users of the service.⁷⁴ A business belonging to a class that had been held affected with a public interest under monopoly conditions has been held such even in the absence of that monopoly element, but this basis of inclusion has a narrow scope.⁷⁵ There are, however, cases in which the factor of monopoly has been invoked to validate legislative price regulation where the evils aimed at were not due to the absence of competition among those rendering the service but to excessive competition among consumers induced by an existing scarcity not resulting from monopolistic practices by those rendering the service. The existence of such a condition may be due to an emergency such as war, and this factor has been stressed in some of the decisions

⁷⁰ *Ribnik v. McBride*, 277 U.S. 350, 48 S.Ct. 545, 72 L.Ed. 913, 56 A.L.R. 1327.

⁷¹ *Williams v. Standard Oil Co. of Louisiana*, 278 U.S. 235, 49 S.Ct. 115, 73 L.Ed. 287, 60 A.L.R. 596.

⁷² *Wolff Packing Co. v. Court of Industrial Relations of State of Kansas*, 262 U.S. 522, 43 S.Ct. 630, 67 L.Ed. 1103, 27 A.L.R. 1280.

⁷³ *Munn v. Illinois*, 94 U.S. 113, 24 L.Ed. 77; *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 50 S.Ct. 220, 74 L.Ed. 524.

⁷⁴ *Townsend v. Yeomans*, 301 U.S. 441, 57 S.Ct. 842, 81 L.Ed. 1210.

⁷⁵ *Budd v. New York*, 143 U.S. 517, 12 S.Ct. 468, 36 L.Ed. 247.

sustaining the legislative fixing of rents and the federal regulation of the prices of coal and other necessities during the war and post-war period.⁷⁶ The emergency, however, reflected itself in a condition that enabled those supplying a commodity or service to exact prices that were deemed socially undesirable, and it was that factor that brought those businesses within the class of those affected with a public interest as long as that condition prevailed. The implication of that position is that the existence of such condition would justify legislative price fixing whatever the cause or character of the emergency producing that condition. It has, however, never been decided that a factual or virtual monopoly alone renders a business one affected with a public interest regardless of its economic or social importance.

The legislative power to fix maximum prices has frequently been held compatible with the requirements of due process independently of the existence of the facts denoted by the technical conception "affected with a public interest." Federal statutes limiting the amount chargeable by attorneys for prosecuting various kinds of claims against the United States do not violate the due process clause of the Fifth Amendment,⁷⁷ even as applied to contracts for such services antedating such statutes.⁷⁸ Nor is the similar clause of the Fourteenth Amendment violated by state statutes limiting the fees of attorneys for services in connection with proceedings under state workmen's compensation acts.⁷⁹ The principal reason for these decisions was the tendency of such legislation to prevent the danger of oppression, extortion and improvident bargains, and the socially injurious consequences thereof. This is also the ultimate basis for sustaining usury statutes,⁸⁰ and such provisions in small loan acts as those that treat wage assignments as loans subject to the interest rate provisions of such acts.⁸¹ Legislative price-fixing is

⁷⁶ *Block v. Hirsh*, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865, 16 A.L.R. 165; *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170, 41 S.Ct. 465, 65 L.Ed. 877; *Highland v. Russell Car & Snowplow Co.*, 279 U.S. 253, 49 S.Ct. 314, 73 L.Ed. 688; *United States v. Pennsylvania Central Coal Co.*, D.C., 256 F. 703; *United States v. Spokans Dry Goods Co.*, D.C., 264 F. 209; *United States v. Oglesby Grocery Co.*, D.C., 264 F. 691.

⁷⁷ *Margolin v. United States*, 269 U.S. 93, 46 S.Ct. 64, 70 L.Ed. 176.

⁷⁸ *Calhoun v. Massie*, 253 U.S. 170, 40 S.Ct. 474, 64 L.Ed. 843.

⁷⁹ *Yeiser v. Dysart*, 267 U.S. 510, 45 S.Ct. 399, 69 L.Ed. 775.

⁸⁰ *Griffith v. State of Connecticut*, 218 U.S. 563, 31 S.Ct. 132, 54 L.Ed. 1151.

⁸¹ *Dunn v. State*, 122 Ohio St. 431, 172 N.E. 148.

sustained in cases such as those just discussed because it directly protects a limited social group from oppression and extortion to which the system of prices determined by individual bargaining exposes them, and thus indirectly protects society at large against effects that the legislatures are free to regard as evils.

The due process problem involved in defining the legitimate scope of government's power to fix the maximum prices that producers may charge consumers arises also in determining the scope of its power to fix minimum prices. The latter has been exerted both to fix minimum prices below which producers and vendors were not permitted to sell and to fix minimum prices required to be paid by buyers of goods or services to their producers or vendors. A public utility is not deprived of its property without due process by being made to observe a legislatively fixed minimum rate in order to prevent an ultimate public injury through an impairment of its service, even though this prevented it from conducting a successful rate war with a competitor.⁸² A state may, as an incident to its power to conserve its public highways, prescribe minimum rates for private carriers using the highways in competition with railroads even though the motive may have been the protection of the latter.⁸³ The field within which government resorted to this economic practise was greatly expanded during the depression when it was employed as an integral part of a wider plan of governmental price control having as its major objective raising the prices to be received by producers of agricultural products. The fixing of minimum prices to be charged by retail vendors as part of such a general plan does not deprive vendors of their property without due process.⁸⁴ The opinion in the *Nebbia* Case rejected the theory that legislative price-fixing and price regulation were limited to "businesses affected with a public interest" in the sense of that phrase as developed in the earlier decisions, held that that phrase meant no more than that the business so described was, for adequate reasons, subject to control for the public good, and made the test of the liability of any business to

⁸² *Public Service Commission of Montana v. Great Northern Utilities Co.*, 289 U.S. 130, 53 S.Ct. 546, 77 L. Ed. 1080.

⁸³ *Stephenson v. Binford*, 287 U.S. 251, 53 S.Ct. 181, 77 L.Ed. 288, 87 A.L.R. 721.

⁸⁴ *NEBBIA v. NEW YORK*, 291

U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469, *Black's Cas. Constitutional Law*, 2d, 441. See *Duncan v. City of Des Moines*, 222 Iowa 218, 268 N.W. 547, and *State ex rel. Fulton v. Ives*, 123 Fla. 401, 167 So. 394, holding violative of due process ordinances fixing minimum prices for barbers.

governmental price control depend on whether it could be justified by principles applicable in determining the validity of any other form of exercise of a state's police power or the federal government's regulatory powers. The test is whether price control is a reasonable means for dealing with an evil which the legislature is free to regard as such, or for the protection or promotion of any valid legislative policy. The earlier concept is still being employed by the courts,⁸⁵ but has lost the greater part, if not all, of its mystical power. The use of the new test has resulted in holding valid the fixing of minimum prices to be paid by buyers to producers,⁸⁶ and in reversing former decisions holding minimum wage laws violative of due process provisions of the federal Constitution.⁸⁷ Minimum wage laws represent a special case of fixing the minimum price payable by purchasers to sellers. The change in general theory as to the test of the validity of price control legislation under due process clauses is especially important at a time when the trend is toward an expansion of government regulation and planning in the field of economic activities, whether directly or through codes formulated by private economic groups but deriving their legal force from an ultimate legislative source.

The resort to price regulation by simultaneously fixing the minimum prices that a distributor must pay the producer and the minimum price he is permitted to charge those to whom he sells may produce a situation in which some distributors may be unable to conduct their business except at a loss. It has been held that due process is not violated by enforcing such a system upon such distributors who were in law permitted to sell at prices in excess of the established minimum but were as a practical matter prevented from so doing. The loss was treated as due not to the state's price control policy but to the risks of competition against which due process clauses afford no protection. The rule would undoubtedly be otherwise if the distributor had been limited to a maximum rather than a minimum selling

⁸⁵ *Townsend v. Yeomans*, 301 U.S. 441, 57 S.Ct. 842, 81 L.Ed. 1210.

⁸⁶ *Hegeman Farms Corp. v. Baldwin*, 293 U.S. 163, 55 S.Ct. 7, 79 L.Ed. 259.

⁸⁷ *Adkins v. Children's Hospital of District of Columbia*, 261 U.S.

525, 43 S.Ct. 394, 67 L.Ed. 785, 24 A.L.R. 1238; *Morehead v. People of New York ex rel. Tipaldo*, 298 U.S. 587, 56 S.Ct. 918, 80 L.Ed. 1347, 103 A.L.R. 1445; *WEST COAST HOTEL CO. v. PARRISH*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703, 103 A.L.R. 1330, *Black's Cas. Constitutional Law*, 2d, 494.

price.⁸⁸ It is undetermined whether a state could validly employ this dual form of price control so as to impose a loss on all those engaged in distributing a commodity, although the implications of the reasoning of the opinion last cited would permit even that result. The distributors could avoid their losses by retiring from the business.

There is a milder form of governmental regulation of prices in which the legislature, instead of fixing them itself or through an administrative board, merely requires sellers or buyers of a commodity to maintain in every locality in which they sell or buy that commodity the same price voluntarily maintained by them therefor in another locality, due allowance being made for differences in transportation costs to or from the several localities. Statutes of this character have generally been aimed at practices frequently resorted to by those bent on monopoly. The imposition of such a limitation upon a seller's freedom of action as an incident of a policy for the prevention of monopolies does not deny him due process.⁸⁹ It is also valid to impose a similar restriction on a buyer's freedom for the same purpose,⁹⁰ but a statute prohibiting buyers of cream from buying at different prices in different localities, which was not limited to cases in which this was done for the purpose of obtaining a monopoly, has been held violative of due process as an arbitrary interference with freedom of contract.⁹¹ The principles of the *Nebbia Case* imply that the preservation of competition is not the only objective that would justify this form of price control. The cases in this field were decided without invoking the conception "affected with a public interest," but by treating the issue like any other involving the validity of a regulation under the due process clauses of state and federal constitutions.⁹²

⁸⁸ *Hegeman Farms Corp. v. Baldwin*, 293 U.S. 163, 55 S.Ct. 7, 79 L. Ed. 259.

⁸⁹ *State ex rel. Young v. Standard Oil Co.*, 111 Minn. 85, 126 N.W. 527; *State v. Drayton*, 82 Neb. 254, 117 N.W. 768, 23 L.R.A., N.S., 287, 130 Am.St.Rep. 671; *Central Lumber Co. v. State of South Dakota*, 226 U.S. 157, 33 S.Ct. 66, 57 L.Ed. 164.

⁹⁰ *State v. Bridgeman & Russell Co.*, 117 Minn. 186, 134 N.W. 496, Ann.Cas.1913D, 41; *State v. Fairmont Creamery Co. of Nebraska*, 153

Iowa 702, 133 N.W. 895, 42 L.R.A., N.S., 821.

⁹¹ *Fairmont Creamery Co. v. State of Minnesota*, 274 U.S. 1, 47 S.Ct. 506, 71 L.Ed. 893, 52 A.L.R. 163.

⁹² The governments of the states and their political subdivisions are not prevented by the due process clauses of their respective constitutions, nor by that of the Fourteenth Amendment to the federal Constitution, U.S.C.A.Const. Amend. 14, from fixing prices at which they will contract with others; *McMillan Co. v.*

The state is limited in exercising its power to fix and regulate prices by the requirements of the equal protection clause of the Fourteenth Amendment. This does not require it to regulate all prices if it chooses to regulate any prices at all, but requires only that it effect no unreasonable classifications in carrying out its policy. The equal protection clause limits it not only in selecting the economic fields that are to be subjected to price regulation, but also prevents unreasonable classification in fixing the prices permitted or required to be charged by the several members of the regulated class. Thus a statute that permitted milk distributors not having a well advertised trade name to sell to retailers at one cent per quart less than the minimum fixed for those having such trade name was held not to deny the latter the equal protection of the law so far as these were in business prior to the enactment of the statute since it merely preserved the situation existing in that respect when the law was enacted, and had not been shown to produce gross unfairness.⁹³ The same statute was, however, held to violate the equal protection clause so far as it limited the right of distributors, having no well advertised trade name, to sell at an advantageous price differential to those members of that sub-class who were in business when the price control system first went into effect. It was held unreasonable in practically excluding from the business distributors entering the field after that date since all distributors were required to pay milk producers the same price.⁹⁴ It does not, however, deny equal protection to a privately operated public utility to subject its rates to the control of a public service commission from which its municipally owned competitor is exempt, since the differences between private and municipal corporations are sufficient to warrant that distinction in their treatment.⁹⁵ The general principles defining the requirements of the equal protection clause in this field are the same as those applied in other fields, and the decisions de-

Johnson, D.C., 269 F. 28. The presently prevailing rule is that those constitutional provisions do not prohibit them from indirectly regulating wages payable by contractors on public works through contract provisions; *Malette v. Spokane*, 77 Wash. 205, 137 P. 496, 51 L.R.A., N.S., 686, Ann.Cas.1915D, 225.

⁹³ *Borden's Farm Products Co. v. TenEyck*, 297 U.S. 251, 56 S.Ct. 453, 80 L.Ed. 669.

⁹⁴ *Mayflower Farms, Inc. v. TenEyck*, 297 U.S. 266, 56 S.Ct. 457, 80 L.Ed. 675.

⁹⁵ *Springfield Gas & Electric Co. v. Springfield*, 257 U.S. 66, 42 S.Ct. 24, 66 L.Ed. 131.

pend upon the reasonableness of the classification in the light of all the relevant facts of the particular case.

Prohibition Against Confiscatory Price Regulation

The power of government to fix and regulate prices for privately conducted enterprises is not, however, unlimited even in those fields of economic activity in which it may validly be employed. The due process clauses of the Fifth and Fourteenth Amendments prevent the federal government and the states, respectively, from pressing price control to the point of confiscation, at least where that consists in prescribing maximum prices chargeable by producers or vendors of commodities or services. The qualification is added because all of the cases thus far decided applying the prohibition against confiscatory rate regulation have been of that character. They have also been cases in which the rates were not prescribed by a contract between the public and the regulated business enterprise. The prohibition against confiscation has been construed to mean that rates and prices prescribed by public authority must, ordinarily, permit a fair return to be earned on the fair value of the property devoted to the public use or employed in rendering the regulated service.⁹⁶ A public utility is entitled to non-confiscatory rates judged by that standard even though it be operating under a consent terminable at will by the city after the expiration of its franchise.⁹⁷ The principle does not, however, require the public to permit a railroad or other public utility for which there is an insufficient economic justification, or which is being inefficiently operated, to charge rates that will permit them to earn what they would be permitted to earn if economically justified and efficiently operated.⁹⁸ The principle is not a form of social security for inefficient and uneconomic enterprises. The burden of proof that the rates are confiscatory is upon the person assailing them, and this can not be met by showing that the rates are unremunerative for the regulated class

⁹⁶ *Smyth v. Ames*, 169 U.S. 466, 18 S.Ct. 418, 42 L.Ed. 819, was among the earliest cases to formulate the principle in such language. It has been repeated in most subsequent rate cases.

⁹⁷ *Denver v. Denver Union Water*

Co., 246 U.S. 178, 38 S.Ct. 278, 62 L.Ed. 649.

⁹⁸ *Arkansas Rate Cases*, C.C., 187 F. 290; *Missouri, K. & T. Ry. Co. v. Love*, C.C., 177 F. 493; *Boyle v. St. Louis & S. F. R. Co.*, D.C., 222 F. 539.

as a whole. The test is to be separately applied to each person whose rates have been regulated.⁹⁹

The application of the principle has given rise to a series of problems whose attempted solution has at times threatened the success of the whole regulatory method. The most important of these has been how to determine the fair value of the property employed in rendering the service whose price was being regulated. The formula given in *Smyth v. Ames*¹ required due consideration and weight to be given to original cost, reproduction cost, the amount and market value of the stocks and bonds issued against the property, and several irrelevant matters. The existing judicial attitude is that its ascertainment is not a matter of formulas, but that it requires the exercise of a reasonable judgment based upon a proper consideration of all the relevant facts.² The stock and bond method has been rejected as a method for ascertaining the required valuation.³ The particular facts that have, however, exercised the greatest influence in applying this element in the rule against confiscation have been the cost of the property actually used in rendering the service, and its cost of reproduction, adjusted for the accrued depreciation.⁴ Valuations that ignored the latter have been frequently held to result in confiscation,⁵ although valua-

⁹⁹ *Aetna Ins. Co. v. Hyde*, 275 U.S. 440, 48 S.Ct. 174, 72 L.Ed. 357; *Townsend v. Yeomans*, 301 U.S. 441, 57 S.Ct. 842, 81 L.Ed. 1210.

¹ 169 U.S. 466, 18 S.Ct. 418, 42 L. Ed. 819.

² *Minnesota Rate Cases*, *Simpson v. Shepard*, 230 U.S. 352, 33 S.Ct. 729, 57 L.Ed. 1511, 48 L.R.A., N.S., 1151, *Ann.Cas.* 1916A, 18.

³ *Chicago, M. & St. P. Ry. Co. v. Tompkins*, C.C., 90 F. 363; *Knoxville v. Knoxville Water Co.*, 212 U.S. 1, 29 S.Ct. 148, 53 L.Ed. 371; *Minnesota Rate Cases*, *Simpson v. Shepard*, 230 U.S. 352, 33 S.Ct. 729, 57 L.Ed. 1511.

⁴ *Knoxville v. Knoxville Water Co.*, 212 U.S. 1, 29 S.Ct. 148, 53 L.Ed. 371; *Willcox v. Consolidated Gas Co. of New York*, 212 U.S. 19, 29 S.Ct. 192, 53 L.Ed. 382, 43 L.R.A., N.S., 1134,

15 *Ann.Cas.* 1034; *Minnesota Rate Cases*, *Simpson v. Shepard*, 230 U.S. 352, 33 S.Ct. 729, 57 L.Ed. 1511; *Newton v. Consolidated Gas Co. of New York*, 258 U.S. 165, 42 S.Ct. 264, 66 L.Ed. 538; *Galveston Electric Co. v. Galveston*, 258 U.S. 388, 42 S.Ct. 351, 66 L.Ed. 678.

⁵ *McCardle v. Indianapolis Water Co.*, 272 U.S. 400, 47 S.Ct. 144, 71 L. Ed. 316; *MISSOURI EX REL. SOUTHWESTERN BELL TEL. CO. v. PUBLIC SERVICE COMM. OF MISSOURI*, 262 U.S. 276, 43 S.Ct. 544, 67 L.Ed. 981, 31 L.R.A., N.S., 807, *Black's Cas. Constitutional Law*, 2d, 454. See dissenting opinion of Mr. Justice Brandeis in the latter case for excellent criticism of the prevailing rule and an affirmative argument for the theory of prudent investment and prudent capital cost theories.

tions that were based on historical cost and which practically ignored cost of reproduction have been sustained where a large part of the plant that was being valued had been recently constructed.⁶ Those based on the use of price indices have been rejected as violating due process requirements.⁷ The burden of proving rates confiscatory is not, however, sustained though the proof shows that the rates will not produce a fair return on valuations based on cost of reproduction, if the regulated producer's actual experience and the history of the financial results of the rates under attack, or of others that would be equally confiscatory by the usual tests, are in irreconcilable conflict with the inference of confiscation.⁸ This is a recent judicial trend that narrows the scope of the former rule. The use of valuation in testing the confiscatory character of rates requires a determination of the elements that have to be valued in computing the rate base. Property not presently used in rendering the service need be included only so far as reasonably required for expansion during a reasonable future period.⁹ The value of franchises granted by the public without cost to the producer,¹⁰ the good will value,¹¹ and the cost of paving over mains that would have to be incurred if the plant were reproduced,¹² need not be included in the valuation. The plant must be valued as a going concern, but this does not necessarily require a separate allowance for "going concern value," but does require the plant to be valued by taking into account that it is

⁶ Los Angeles Gas & Electric Corp. v. Railroad Commission of California, 289 U.S. 287, 53 S.Ct. 637, 77 L. Ed. 1180.

⁷ West v. Chesapeake & Potomac Tel. Co. of Baltimore, 295 U.S. 662, 55 S.Ct. 894, 79 L.Ed. 1640.

⁸ Lindheimer v. Illinois Bell Tel. Co., 292 U.S. 151, 54 S.Ct. 658, 78 L.Ed. 1182; Dayton Power & Light Co. v. Public Utilities Commission of Ohio, 292 U.S. 290, 54 S.Ct. 647, 78 L.Ed. 1267.

⁹ Cedar Rapids Gas Light Co. v. Cedar Rapids, 144 Iowa 426, 120 N. W. 966, 48 L.R.A.,N.S., 1025, 138 Am. St.Rep. 299; Spring Valley Water Works v. City and County of San Francisco, C.C., 192 F. 137; Long

Branch Comm. v. Tintern Manor Water Co., 70 N.J.Eq. 71, 62 A. 474.

¹⁰ Lincoln Gas & Electric Light Co. v. Lincoln, C.C., 182 F. 926; Cumberland Telephone & Telegraph Co. v. Louisville, C.C., 187 F. 637; see for a case in which exceptional circumstances were held to require its inclusion, Willcox v. Consolidated Gas Co. of New York, 212 U.S. 19, 29 S.Ct. 192, 53 L.Ed. 382, 48 L.R.A.,N.S., 1134, 15 Ann.Cas. 1034.

¹¹ Cedar Rapids Gas Light Co. v. Cedar Rapids, 223 U.S. 655, 32 S.Ct. 389, 56 L.Ed. 594.

¹² Des Moines Gas Co. v. City of Des Moines, 238 U.S. 153, 35 S.Ct. 811, 59 L.Ed. 1244.

part of an established business enterprise.¹³ Costs of financing and organization expenses must usually be included in computing the rate base,¹⁴ but these may be excluded unless it is shown either that they were actually incurred or would have to be incurred under present conditions.¹⁵ The rate base must include an allowance for working capital.¹⁶

The application of the principle prohibiting confiscatory rates requires not only the ascertainment of the fair value of the property used in the service but also the ascertainment of the net earnings under the regulated rates in order that it may be determined whether the latter constitute a fair rate of return on that value. The computation of such net earnings involves the deduction from gross operating revenues of the expenses incurred in producing those revenues. Direct and overhead costs are both includible in the deductible expenses. There must be an adequate allowance for the depreciation of the property used in producing the service, and it has been held that it must be computed on the basis of the present value of the depreciable portion of the plant in order that the reserve may be adequate to replace it when replacement becomes necessary.¹⁷ The fact that a public utility has made excessive depreciation charges in the past does not justify an indirect disallowance of adequate depreciation for the future by requiring operating deficits below a fair return to be charged against the excessive depreciation reserve built up through the excessive depreciation of the past, since that would require past profits to sustain presently confiscatory rates.¹⁸ This fact, coupled with the fact that the depreciation reserve will not be used to reduce the rate base if

¹³ Cedar Rapids Gas Light Co. v. Cedar Rapids, 223 U.S. 655, 32 S.Ct. 389, 56 L.Ed. 594; Des Moines Gas Co. v. City of Des Moines, 238 U.S. 153, 35 S.Ct. 811, 59 L.Ed. 1244; Los Angeles Gas & Electric Co. v. Railroad Commission of California, 289 U.S. 287, 53 S.Ct. 637, 77 L.Ed. 1180; for case in which a separate allowance was made for "going value", see Denver v. Denver Union Water Co., 246 U.S. 178, 38 S.Ct. 278, 62 L.Ed. 649.

¹⁴ Ohio Utilities Co. v. Public Utilities Commission of Ohio, 267 U.S. 359, 45 S.Ct. 259, 69 L.Ed. 656.

¹⁵ Wabash Valley Electric Co. v. Young, 287 U.S. 488, 53 S.Ct. 234, 77 L.Ed. 447.

¹⁶ Mobile Gas Co. v. Patterson, D. C., 293 F. 208.

¹⁷ United Rys. & Electric Co. of Baltimore v. West, 280 U.S. 234, 50 S.Ct. 123, 74 L.Ed. 390; see, also, discussion of depreciation adjustment in valuation in Lindheimer v. Illinois Bell Tel. Co., 292 U.S. 151, 54 S.Ct. 658, 78 L.Ed. 1182.

¹⁸ Board of Public Utility Com'rs v. New York Tel. Co., 271 U.S. 23, 46 S.Ct. 363, 70 L.Ed. 808.

expert testimony based on an inspection of the property shows it to be excessive,¹⁹ permits the utility to include in the rate base an amount of value already recovered from the public through its policy of excessive depreciation. The fact that the depreciation reserve is shown to be excessive is, however, a factor in determining what is an adequate depreciation expense charge.²⁰ The expenses recoverable through the rates must be reasonable, but they are generally deemed such, whatever their amount, if they are the result of dealing at arm's length. If they are not the result of such dealing, but rather result from arrangements between members of an affiliated group, affirmative evidence of their reasonableness is required, and the public is entitled to limit recoverable expenses to a fair amount.²¹ The same principle is applied to prevent the regulated utility from understating its income by diverting a part of it to a controlled subsidiary.²² Subject to such limitations, all operating costs must be permitted to be recovered through the rates. Capital expenditures may not be treated as operating expenses.²³

The last requirement of the rule against confiscation is that the net operating income must constitute a fair return upon the fair value of the property used in rendering the services for which maximum rates have been established. What constitutes a fair return is not a matter of fixed rule but of fair and reasonable judgment. The rate should reflect the risk factor connected with the business, and should be sufficient to maintain the utility's credit and attract capital to the utility field.²⁴ It

¹⁹ *Pacific Gas & Electric Co. v. City and County of San Francisco*, 265 U.S. 403, 44 S.Ct. 537, 68 L.Ed. 1075.

²⁰ *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133, 51 S.Ct. 65, 75 L.Ed. 255.

²¹ *Dayton Power & Light Co. v. Public Utilities Commission of Ohio*, 292 U.S. 290, 54 S.Ct. 647, 78 L.Ed. 1267; *Western Distributing Co. v. Public Service Commission*, 285 U.S. 119, 52 S.Ct. 283, 76 L.Ed. 655; *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133, 51 S.Ct. 65, 75 L.Ed. 255; *Cf. with STATE OF MISSOURI EX REL. SOUTHWESTERN BELL TEL.*

CO. v. PUBLIC SERVICE COMMISSION OF MISSOURI, 262 U.S. 276, 43 S.Ct. 544, 67 L.Ed. 981, 31 A.L.R. 807, *Black's Cas. Constitutional Law*, 2d, 454.

²² *United Fuel Gas Co. v. Railroad Commission of Kentucky*, 278 U.S. 300, 49 S.Ct. 150, 73 L.Ed. 390.

²³ *Reno Power, Light & Water Co. v. Public Service Commission of Nevada, D.C.*, 298 F. 790; *Id.*, D.C., 300 F. 645.

²⁴ *Bluefield Water Works & Improvement Co. v. Public Service Commission of West Virginia*, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176.

has also been stated that it should be large enough to permit a reasonable dividend and the transfer of something to surplus.²⁵

The application of the rule prohibiting confiscatory rates is easiest in cases in which a utility renders a single service in a single market. Additional problems arise where it renders numerous services or serves two or more distinct markets. The problem of the unit to which the "confiscation rule" shall be applied offers the greatest difficulties in the case of railroad services, but occurs elsewhere also. It was early decided that the constitutionality of a general regulation of intrastate rates must be judged by whether those rates permit the earning of a fair return on the fair value of the property employed in rendering intrastate service.²⁶ The same principle has been applied to intrastate telephone rates.²⁷ Rates prescribed for the passenger service of a railroad must permit the earning of a fair return on the property used in that branch of the service,²⁸ but their confiscatory character may be tested by their results over the whole line instead of on particular parts thereof.²⁹ A state may not segregate a particular class of traffic and compel a carrier to transport it in intrastate commerce at less than cost, or without a substantial compensation, even though the return of the carrier from its entire intrastate operations may be adequate.³⁰ Departures from these principles have been sanctioned in the case of particular rates where necessary to prevent unreasonable discrimination.³¹ A public utility

²⁵ *United Rys. & Electric Co. of Baltimore v. West*, 280 U.S. 234, 50 S.Ct. 123, 74 L.Ed. 390.

²⁶ *Smyth v. Ames*, 169 U.S. 466, 18 S.Ct. 418, 42 L.Ed. 819.

²⁷ *Smith v. Illinois Bell Tel. Co.*, 232 U.S. 133, 51 S.Ct. 65, 75 L.Ed. 255.

²⁸ *Norfolk & W. Ry. Co. v. Conley*, Attorney General of West Virginia, 236 U.S. 605, 35 S.Ct. 437, 59 L.Ed. 745.

²⁹ *Groesbeck v. Duluth, S. S. & A. R. Co.*, 250 U.S. 607, 40 S.Ct. 33, 63 L.Ed. 1167.

³⁰ *Northern Pacific Ry. Co. v. North Dakota ex rel. McCue*, 236 U.

S. 585, 35 S.Ct. 429, 59 L.Ed. 735, L.R.A.1917F, 1148, Ann.Cas.1916A, 1; *Vandallia R. Co. v. Schnull*, 255 U.S. 113, 41 S.Ct. 324, 65 L.Ed. 539; *Northern Pacific Ry. Co. v. Department of Public Works of State of Washington*, 268 U.S. 39, 45 S.Ct. 412, 69 L.Ed. 837; *Banton v. Belt Line Ry. Co.*, 268 U.S. 413, 45 S.Ct. 534, 69 L.Ed. 1020; cf. with earlier case, *St. Louis & S. F. Ry. Co. v. Gill*, 156 U.S. 649, 15 S.Ct. 484, 39 L.Ed. 567.

³¹ *Atlantic Coast Line R. Co. v. State of Florida*, 203 U.S. 256, 261, 27 S.Ct. 108, 109, 51 L.Ed. 174, 175; *Alabama & V. R. Co. v. Railroad Commission of Mississippi*, 203 U.S. 496, 27 S.Ct. 163, 51 L.Ed. 289.

is no more entitled to have the validity of particular rates determined by treating its entire business as a unit than is the state, and a specific rate that is remunerative is not rendered confiscatory merely because the utility's entire business may be unprofitable any more than the profitableness of the entire business justifies a state in enforcing unremunerative rates in particular cases.³² It is necessary in passing on the validity of particular rates, or of rates covering a part only of the services rendered by a utility, to determine both the value of the property used in rendering the regulated service and the costs incurred therein. The value of property used in common in rendering it and other services, and operating expenses not directly assignable to it, must be allocated to it on some basis. The general method employed is to allocate values and apportion expenses on the basis of factors that reflect the use of the property in producing the service and the extent to which it is fairly responsible for and chargeable with operating expenses.³³

The difficulties inhering in the problem of determining the confiscatory character of rates, and the fact that the process involves many uncertain matters that have to be estimated, has led courts to sanction resort to test periods.³⁴ It has also been held that the state may prescribe temporary rates pending investigation required to fix permanent rates, even though they be confiscatory, if provision is made for allowing the utility to recover any deficiency below the constitutionally protected return through the rates finally fixed.³⁵ Temporary rates that are confiscatory may not be enforced in the absence of some provision safeguarding the utility against ultimate loss from their enforcement.³⁶ The devices of test periods and temporary rates were devised to meet the difficulties resulting from the excessive duration of rate litigation.

³² *Wabash Valley Electric Co. v. Young*, 287 U.S. 488, 53 S.Ct. 234, 77 L.Ed. 447.

³³ *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U.S. 167, 20 S.Ct. 336, 44 L.Ed. 417; *Boyle v. St. Louis & S. F. R. Co.*, D.C., 222 F. 539; *Arkansas Rate Cases*, C.C., 187 F. 290.

³⁴ *Darnell v. Edwards*, 244 U.S.

564, 37 S.Ct. 701, 61 L.Ed. 1317; *Groesbeck v. Duluth, S. S. & A. R. Co.*, 250 U.S. 607, 40 S.Ct. 38, 63 L.Ed. 1167.

³⁵ *Bronx Gas & Electric Co. v. Maltbie*, 271 N.Y. 364, 3 N.E.2d 512.

³⁶ *Prendergast v. New York Tel. Co.*, 262 U.S. 43, 43 S.Ct. 466, 67 L. Ed. 853.

Special Regulations Applicable to Public Utilities

The category of "business affected with a public interest" has lost much of its importance as a factor defining the scope of governmental price regulation. It has not yet been abandoned as a test for defining the industries subject to types of regulation from which ordinary businesses are immune. A person embarking his capital in the latter cannot be compelled to increase his facilities. Nor has it ever yet been decided that this duty may be imposed on every business that had been classed as one affected with a public interest for purposes of subjecting it to governmental price control. The cases sustaining the imposition of the obligation to furnish adequate facilities to the public, and to expand inadequate facilities if that be necessary to meet the former obligation, have practically always involved what are sometimes described as quasi public businesses conducted under a public grant imposing a correlative duty to operate. Common carriers and utilities enjoying special franchises are the principal members of that class. A statute imposing that character upon a person who has never held himself out as such deprives him of his property without due process of law,³⁷ and a state's act conditioning the right of a contract carrier to use its highways on his subjecting himself to the system of regulation applicable to common carriers denies him due process.³⁸ Those who have voluntarily held themselves out as common carriers, or entered the public utility field, are deemed to have assumed the obligation to furnish adequate facilities to serve the public, and may be compelled to construct additional facilities to meet that obligation at their own expense.³⁹ This does not deny them due process if the requirement is reasonable, and it is not unreasonable merely because the expenditure will not prove immediately remunerative or may even involve a loss.⁴⁰ The cost and the probable income from the increased facilities are, however, factors bearing on the reasonableness of the requirement. These principles have been applied to sustain orders requiring railroads to construct

³⁷ *Michigan Public Utilities Commission v. Duke*, 266 U.S. 570, 45 S. Ct. 191, 69 L.Ed. 445, 36 A.L.R. 1105.

³⁸ *Frost v. Railroad Commission of California*, 271 U.S. 583, 46 S.Ct. 605, 70 L.Ed. 1101, 47 A.L.R. 457.

³⁹ *Chicago & N. W. R. Co. v. Ochs*,

249 U.S. 416, 39 S.Ct. 343, 63 L.Ed. 679; *Lake Erie & W. R. Co. v. Illinois Public Utilities Commission of Illinois ex rel. Cameron*, 249 U.S. 422, 39 S.Ct. 345, 63 L.Ed. 684.

⁴⁰ *Western & A. R. R. Co. v. Georgia Public Service Commission*, 267 U.S. 493, 45 S.Ct. 409, 69 L.Ed. 753.

spur tracks to serve particular industries⁴¹ and switch connections with other railroads to facilitate an exchange of traffic,⁴² and requiring gas companies to extend their mains to areas covered by their franchises.⁴³ Due process is, however, violated by requiring a railroad to construct private facilities at its expense,⁴⁴ and by compelling these quasi-public businesses to enter a new field which they have never assumed to serve.⁴⁵ Their right to discontinue their services may also be restricted. Due process is violated by a statute requiring owners of a business other than these quasi-public businesses to continue the business as long as it is operating without loss.⁴⁶ It is not violated by imposing that requirement upon those engaged in these quasi-public businesses,⁴⁷ but, in the absence of a contract obligation to continue, they cannot be compelled to continue operations at a loss since that would deprive them of property without due process.⁴⁸ A state may, however, validly insist that they do not discontinue a part only of the services they are obligated to perform under a single franchise, and may limit them to discontinuing the whole of the service if that is unremunerative.⁴⁹ The

⁴¹ See cases cited in notes 39 and 40.

⁴² *Wisconsin, M. & P. R. Co. v. Jacobsen*, 179 U.S. 287, 21 S.Ct. 115, 45 L.Ed. 194; *Grand Trunk R. Co. of Canada v. Michigan Railroad Commission*, 231 U.S. 457, 34 S.Ct. 152, 58 L.Ed. 310.

⁴³ *People of State of New York ex rel. New York & Queens Gas Co. v. McCall*, 245 U.S. 345, 38 S.Ct. 122, 62 L.Ed. 337; *People's Natural Gas Co. v. Public Service Commission of Pennsylvania*, 270 U.S. 550, 46 S.Ct. 371, 70 L.Ed. 726.

⁴⁴ *Great Northern Ry. Co. v. Minnesota ex rel. Railroad & Warehouse*, 238 U.S. 340, 35 S.Ct. 753, 59 L.Ed. 1337; *Great Northern Ry. Co. v. Cahill*, 253 U.S. 71, 40 S.Ct. 457, 64 L.Ed. 787, 10 A.L.R. 1335; *Missouri Pac. R. Co. v. Nebraska*, 217 U.S. 196, 30 S.Ct. 461, 54 L.Ed. 727, 18 Ann.Cas. 989.

⁴⁵ *Southern Bell T. & T. Co. v. Calhoun*, 287 F. 381.

⁴⁶ *CHAS. WOLFF PACKING CO. v. COURT OF INDUSTRIAL RELATIONS OF KANSAS*, 267 U.S. 552, 45 S.Ct. 441, 69 L.Ed. 785, *Black's Constitutional Law*, 2d, 488.

⁴⁷ *Fort Smith Light & Traction Co. v. Bourland*, 267 U.S. 330, 45 S.Ct. 249, 69 L.Ed. 631.

⁴⁸ *Brooks-Scanlon Co. v. Railroad Commission of Louisiana*, 251 U.S. 396, 40 S.Ct. 183, 64 L.Ed. 323; *Bullock v. Florida ex rel. Railroad Commission of Florida*, 254 U.S. 513, 41 S.Ct. 193, 65 L.Ed. 380; *Railroad Commission of State of Texas v. Eastern Texas R. Co.*, 264 U.S. 79, 44 S.Ct. 247, 68 L.Ed. 569; *Chesapeake & Ohio Ry. Co. v. Public Service Commission of West Virginia*, 242 U.S. 603, 37 S.Ct. 234, 61 L.Ed. 520.

⁴⁹ *Fort Smith Light & Traction Co. v. Bourland*, 267 U.S. 330, 45 S.Ct. 249, 69 L.Ed. 631; *Broad River Power Co. v. South Carolina ex rel. Daniel*, 281 U.S. 537, 50 S.Ct. 401, 74 L.Ed. 1023.

states frequently require such businesses to procure the consent of public authorities before they can discontinue their services, and the foregoing principles are employed to determine when withdrawal without such consent is legal. The state's power to deny persons the right to engage in such businesses by refusing them a certificate of convenience and necessity is as well established as its power to force them to continue operations, and a denial of such certificate does not violate due process if the refusal is not arbitrary.⁵⁰ Business of this class may also be subjected to numerous other forms of regulation that would be held so unreasonable as to violate due process in the case of other businesses. Thus railroads may be compelled to accept and carry freight in cars not their own even though this results in their own equipment remaining idle.⁵¹ The initial carrier may also be made liable to the shipper for damages caused by connecting carriers, if it is subrogated to the shipper's rights against the carrier actually responsible for the wrong,⁵² and a similar liability may be imposed on any carrier in a through route under the same limitation.⁵³ The regulation of other aspects of the activities of these businesses has been frequently sustained without invoking their special character. Thus laws requiring railroads to operate their trains with a prescribed minimum of employees,⁵⁴ imposing on them liability for damages for stock killed in consequence of their neglect to fence their roads or to provide cattle guards,⁵⁵ and making them liable for property destroyed by fire communicated by their locomotives,⁵⁶ have been held not to violate due process by reasoning of a kind that might be found in passing on the validity of statutes not affecting these quasi-public businesses. It is a fair question whether future decisions may not validate the extension to ordinary

⁵⁰ *Stanley v. Public Utilities Commission*, 295 U.S. 76, 55 S.Ct. 628, 79 L.Ed. 1311.

⁵¹ *Chicago, M. & St. P. R. Co. v. Iowa*, 233 U.S. 334, 34 S.Ct. 592, 53 L.Ed. 988.

⁵² *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U.S. 186, 31 S.Ct. 164, 55 L.Ed. 167, 31 L.R.A.N.S., 7; *Chicago & N. W. Ry. Co. v. Nye-Schneider-Fowler Co.*, 260 U.S. 35, 43 S.Ct. 55, 67 L.Ed. 115.

⁵³ *Atlantic Coast Line R. Co. v. Glenn*, 239 U.S. 388, 36 S.Ct. 154, 60 L.Ed. 344.

⁵⁴ *St. Louis, I. M. & S. R. Co. v. Arkansas*, 240 U.S. 518, 36 S.Ct. 443, 60 L.Ed. 776.

⁵⁵ *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U.S. 26, 9 S.Ct. 207, 32 L.Ed. 585.

⁵⁶ *St. Louis & S. F. R. Co. v. Mathews*, 165 U.S. 1, 17 S.Ct. 243, 41 L.Ed. 611.

businesses of some of the extraordinary regulations already sustained for these so-called quasi-public businesses.⁵⁷

REGULATION OF CAPITAL AND LABOR RELATIONS

243. Government may intervene to regulate the relations of capital and labor, and the resulting restrictions on freedom of contract do not, if reasonable, deprive either capital or labor of liberty or property without due process of law. The present trend is in the direction of permitting a more extensive governmental intervention in this field than heretofore.

Regulating Hours of Labor

The right to labor, and to enter into contracts relating thereto, is a part of the liberty and property protected against unreasonable governmental regulation by the due process clauses of our constitutions.⁵⁸ It is, however, no more immune from reasonable regulation than are the other rights included within those terms. It has been authoritatively stated that "the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people", and that "liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."⁵⁹ The past half century has been marked by a great body of both state and federal legislation limiting the freedom of employers and employees with respect to the terms and provisions of the contract of employment. A great deal of this has been predicated on the view that state intervention was necessary to prevent the inequality of bargaining power between employer and employee from producing what were deemed socially injurious consequences, and this view has received judicial sanction.⁶⁰ The legislation limiting the hours of labor that

⁵⁷ Private carriers may, for example, be subjected to many regulations formerly deemed applicable to common carriers only; see *Stephenson v. Binford*, 287 U.S. 251, 53 S.Ct. 181, 77 L.Ed. 288, 87 A.L.R. 721.

⁵⁸ *LOCHNER v. PEOPLE OF STATE OF NEW YORK*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937, 3 Ann.

Cas. 1133, Black's Cas. Constitutional Law, 2d, 467.

⁵⁹ *WEST COAST HOTEL CO. v. PARRISH*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703, 108 A.L.R. 1330, Black's Cas. Constitutional Law, 2d, 494.

⁶⁰ *Holden v. Hardy*, 169 U.S. 366, 18 S.Ct. 383, 42 L.Ed. 780.

has thus far been sustained as consistent with due process has been held valid principally because reasonably deemed by the legislatures promotive of the public health. Statutes limiting working hours for women to ten hours in specified industries have been held not to deny either employer or employee due process for reasons that would justify such limitation in practically every known industry.⁶¹ Those limiting such employment to eight hours in certain lines such as hotels and hospitals have also been sustained against due process objections,⁶² but an eight-hour law for women employed in mercantile establishments was held to violate the due process clause of a state constitution regardless of its validity under the due process clause of the Fourteenth Amendment to the federal Constitution.⁶³ The equal protection clause is not violated by restricting such statutes to women, by excluding women employed in other lines, or even some employed in the same line.⁶⁴ The right of the state to limit the hours of labor of adult males in dangerous or unhealthful occupations was established at an early date,⁶⁵ and more recently its right to limit their working hours to ten in manufacturing establishments has been sustained.⁶⁶ This case may be taken as definitely eliminating *Lochner v. New York*⁶⁷ as a factor in the constitutional issues raised by legislation of this character. A federal eight-hour law for adult male employees of interstate railroads was held not to violate the due process clause of the Fifth Amendment, but the scope of the decision must be deemed limited because of the emphasis upon the emergency character of the statute found in the majority opinion.⁶⁸ It has been intimated that limitation of hours of labor would be invalid if pushed to an indefensible extreme.⁶⁹ It is too early to determine

⁶¹ *MULLER v. OREGON*, 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551, 13 Ann.Cas. 957, Black's Cas. Constitutional Law, 2d, 476; *Riley v. Commonwealth of Massachusetts*, 232 U.S. 671, 34 S.Ct. 469, 58 L.Ed. 788; *Miller v. Wilson*, 236 U.S. 373, 35 S.Ct. 342, 59 L.Ed. 628, L.R.A.1915F, 829.

⁶² *Miller v. Wilson*, *supra*, footnote 61; *Bosley v. McLaughlin*, 236 U.S. 385, 35 S.Ct. 345, 59 L.Ed. 632.

⁶³ *State v. Henry*, 37 N.M. 536, 25 P.2d 204, 90 A.L.R. 805.

⁶⁴ *Dominion Hotel, Inc. v. State of Arizona*, 249 U.S. 265, 39 S.Ct. 273, 63

L.Ed. 597; see, also, cases in footnotes 61 and 62.

⁶⁵ *Holden v. Hardy*, 169 U.S. 366, 18 S.Ct. 383, 42 L.Ed. 780.

⁶⁶ *Bunting v. State of Oregon*, 243 U.S. 426, 37 S.Ct. 435, 61 L.Ed. 830, Ann.Cas.1918A, 1043.

⁶⁷ 198 U.S. 45, 25 S.Ct. 539, 49 L. Ed. 937, 3 Ann.Cas. 1133.

⁶⁸ *Wilson v. New*, 243 U.S. 332, 37 S.Ct. 298, 61 L.Ed. 755, L.R.A.1917E, 938, Ann.Cas.1918A, 1024.

⁶⁹ *Bosley v. McLaughlin*, 236 U.S. 385, 35 S.Ct. 345, 59 L.Ed. 632.

the part that factors other than public health and morals, such as economic theories of spreading work, are to play in defining the "indefensible extreme." Compulsory limitation of hours, however, must be by governmental action, and it denies due process to delegate the power to private persons.⁷⁰ The state and federal governments may limit the hours that employees of public contractors may labor in the performance of those contracts.⁷¹ Their power to do so is probably not subject to the suggested limit on their power to prescribe maximum hours for private employers and employees. A state may also impose reasonable limitations on the time of day during which women may be employed. It does not violate due process to prohibit them from working in restaurants between 10 P. M. and 6 A. M. since this is a reasonable health and morals measure, nor does it deny equal protection to except therefrom singers, performers and cloak room attendants.⁷² A state's right to prohibit completely the industrial employment of minors below sixteen years is definitely established,⁷³ but this power to protect minors must be reasonably exercised if it is to be valid.

Minimum Wage Legislation

The wage term in contracts of employment is not beyond reasonable governmental regulation. A statute requiring corporate employers to pay wages at stated periods does not violate due process,⁷⁴ and some of the reasoning supporting that conclusion would justify a similar requirement for non-corporate employers. Statutes prohibiting the payment of wages in store orders or in checks redeemable in anything other than money do not invalidly limit freedom of contract.⁷⁵ Laws providing

⁷⁰ *Carter v. Carter Coal Co.*, 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160.

556, 61 S.E. 525, 17 L.R.A.,N.S., 602, 15 Ann.Cas. 470.

⁷¹ *Atkin v. Kansas*, 191 U.S. 207, 24 S.Ct. 124, 48 L.Ed. 148.

⁷⁴ *Erie R. Co. v. Williams*, 233 U.S. 685, 34 S.Ct. 761, 58 L.Ed. 1155, 51 L.R.A.,N.S., 1097.

⁷² *Radice v. People of State of New York*, 264 U.S. 292, 44 S.Ct. 325, 68 L.Ed. 690.

⁷³ *Sturges & Burn Mfg. Co. v. Beauchamp*, 231 U.S. 320, 34 S.Ct. 60, 58 L.Ed. 245, L.R.A.1915A, 1196; *Re Weber*, 149 Cal. 392, 86 P. 809; *Inland Steel Co. v. Yedinak*, 172 Ind. 423, 87 N.E. 229, 139 Am.St.Rep. 389; *Starnes v. Albion Mfg. Co.*, 147 N.C.

⁷⁵ *Keokee Consolidated Coke Co. v. Taylor*, 234 U.S. 224, 34 S.Ct. 856, 58 L.Ed. 1288; *Knoxville Iron Co. v. Harbison*, 183 U.S. 13, 22 S.Ct. 1, 46 L.Ed. 55. Cf. *Owen v. Westwood Lumber Co.*, D.C., 22 F.2d 992, holding violative of due process as an unreasonable interference with freedom of contract a statute making it a crime for an employer to compel an

that miners paid on the basis of coal mined should be paid on the basis of unscreened coal have also been sustained.⁷⁶ This latter amounted in substance to a direct regulation of wages although the wage rate was still left open for private bargaining. The attempt of government to prescribe minimum wages for adult women was first held to deprive both them and their employers of liberty and property without due process.⁷⁷ This position was subsequently reaffirmed in a case involving a statute which differed from that passed on in the prior case in requiring the minimum wage to correspond to the reasonable value of the services of the employee.⁷⁸ The theory of the prevailing opinion was that the states were entirely without power "by any form of legislation to prohibit, change or nullify contracts between employers and adult women workers as to the amount of wages to be paid." These cases were overruled shortly after the decision in the latter of them by a decision which held that a statute authorizing a board in substance to fix minimum wages for women in industry which would be adequate for their maintenance did not deprive employers of liberty or property without due process of law, nor violate the equal protection clause by its restriction to minors and adult women.⁷⁹ The fixing of wages for adult male operating employees of interstate railroads for a limited period pending an official investigation of an existing dispute between the railroads and their employees was held not to violate the due process clause of the Fifth Amendment.⁸⁰ The emphasis of the Court on the temporary and emergency character of the measure does not warrant the inference that the fixing of minimum wages for adult males would be valid as a general policy, although the specific emphasis in that case cannot be said to imply that such policy would be valid only as

employee to board at a company hotel or buy at a company store by threats of discharge or other forms of intimidation.

⁷⁶ *McLEAN v. STATE OF ARKANSAS*, 211 U.S. 539, 29 S.Ct. 206, 53 L.Ed. 315, *Black's Cas. Constitutional Law*, 2d, 465.

⁷⁷ *Adkins v. Children's Hospital of District of Columbia*, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785, 24 A.L.R. 1238.

⁷⁸ *Morehead v. People of State of*

New York ex rel. Tipaldo, 298 U.S. 587, 56 S.Ct. 918, 80 L.Ed. 1347, 103 A.L.R. 1445.

⁷⁹ *WEST COAST HOTEL CO. v. PARRISH*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703, 108 A.L.R. 1330, *Black's Cas. Constitutional Law*, 2d, 494.

⁸⁰ *Wilson v. New*, 243 U.S. 332, 37 S.Ct. 298, 61 L.Ed. 755, L.R.A.1917E, 938, *Ann.Cas.*1918A, 1024; see, also, *Bunting v. State of Oregon*, 243 U.S. 426, 37 S.Ct. 435, 61 L.Ed. 830, *Ann. Cas.*1918A, 1043.

a temporary and emergency measure. The majority opinion in the case finally sustaining minimum wages for adult women workers held the measure to be a reasonable means for eliminating the socially undesirable consequences of the disparity in bargaining power of employers and employees (stating that this factor was especially applicable to the employment of women), and also supported its conclusion by denying that the due process clause requires a state to bear the burden produced by low wages and thus indirectly subsidize "unscrupulous employers." These reasons would equally sustain the application of minimum wage statutes to adult male employees. The validity of minimum wage statutes under due process clauses has, however, been determined only in their application to women and minors, and it has also been definitely determined that giving them that limited scope does not violate the equal protection clause of the Fourteenth Amendment to the federal Constitution.

Employers' Liability and Workmen's Compensation Acts

The common law distributed the losses resulting from injuries to employees in the course of their employment by a system of rules that imposed those losses on the employer only if due to his negligence, and even then only if the employee's own negligence had not contributed to the injury, if that of a fellow servant had not so contributed, and if the injury were not due to a risk voluntarily assumed by the employee. These rules were not placed, by the Fourteenth Amendment, beyond the states' power to alter them through legislation designed to promote the general welfare by the enactment of other and reasonable rules of liability.⁸¹ Statutes effecting a redistribution of those risks have been frequently sustained. The employer's property is not taken without due process by statutes depriving him of the defences denoted by the fellow servant, assumption of risk, and contributory negligence rules where the employee's contributory negligence is neither wilful nor intentional.⁸² A state may also declare void contracts intended to prevent the application of any standard of liability that it may impose.⁸³ A state may, how-

⁸¹ *Arizona Copper Co. v. Hammer*, 250 U.S. 400, 39 S.Ct. 553, 63 L.Ed. 1058, 6 A.L.R. 1537.

⁸² *Ives v. South Buffalo Ry. Co.*, 201 N.Y. 271, 94 N.E. 431, 34 L.R.A., N.S., 162, Ann.Cas.1912B, 156; *Missouri Pac. Ry. Co. v. Mackey*, 127

U.S. 205, 8 S.Ct. 1161, 32 L.Ed. 107; *Missouri Pac. Ry. Co. v. Castle*, 224 U.S. 541, 32 S.Ct. 606, 56 L.Ed. 875.

⁸³ *Chicago B. & Q. R. Co. v. McGuire*, 219 U.S. 549, 31 S.Ct. 259, 55 L.Ed. 323.

ever, go even beyond the mere denial of certain common law defenses to the employer when sued by an employee for an injury occurring in the course of employment, and, at least in what may reasonably be held to be hazardous industries, substitute liability without fault for that based on the employer's fault. This has been accomplished through the enactment of employers' liability and workmen's compensation acts in most of the states. The imposition of liability without fault upon employers that is frequently effected by these acts does not deprive them of liberty or property without due process of law.⁸⁴ Workmen's compensation acts have been either optional on the part of both the employers and employees, or compulsory with respect to one or both of them. Both types have been held to meet the requirements of due process clauses.⁸⁵ A system which accords an injured employee alone an option not allowed employers does not on that account deny the latter either due process or the equal protection of the laws.⁸⁶ Resort to an optional system of workmen's compensation is valid, and the state may resort to any reasonable device to insure acceptance of the policy embodied in workmen's compensation acts. It may for that purpose penalize non-assenting employers by depriving them of their usual common law defenses, and non-assenting employees by cutting down their common law rights against assenting employers, and these differences in treatment between assenting and non-assenting employers and employees do not involve any violation of the equal protection clause of the Fourteenth Amendment.⁸⁷ Due process is not violated by requiring employers of a given class to contribute to a fund controlled and administered by the state out of which compensation awards are to be paid, although this has the effect of forcing the employers of the

⁸⁴ *Mountain Timber Co. v. Washington*, 243 U.S. 219, 37 S.Ct. 260, 61 L.Ed. 685, Ann.Cas.1917D, 642; *Hawkins v. Bleakly*, 243 U.S. 210, 37 S.Ct. 255, 61 L.Ed. 678, Ann.Cas.1917D, 637; *New York Cent. R. Co. v. White*, 243 U.S. 188, 37 S.Ct. 247, 61 L.Ed. 667, L.R.A.1917D, 1, Ann.Cas.1917D, 629; *Jeffrey Mfg. Co. v. Blagg*, 235 U.S. 571, 35 S.Ct. 167, 59 L.Ed. 364; *Middleton v. Texas Power & Light Co.*, 249 U.S. 152, 39 S.Ct. 227, 63 L.Ed. 527; *Lower Vein Coal Co. v. Industrial Board of In-*

diana, 255 U.S. 144, 41 S.Ct. 252, 65 L.Ed. 555.

⁸⁵ See cases cited in footnote 84.

⁸⁶ *Arizona Copper Co. v. Arizona*, 250 U.S. 400, 39 S.Ct. 553, 63 L.Ed. 1058, 6 A.L.R. 1537.

⁸⁷ *Jeffrey Mfg. Co. v. Blagg*, 235 U.S. 571, 35 S.Ct. 167, 59 L.Ed. 364; *Hawkins v. Bleakly*, 243 U.S. 210, 37 S.Ct. 255, 61 L.Ed. 678, Ann.Cas.1917D, 637; *Middleton v. Texas Power & Light Co.*, 249 U.S. 152, 39 S.Ct. 227, 63 L.Ed. 527.

class to assume financial responsibilities to meet liabilities imposed on others of the class.⁸⁸ Systems of workmen's compensation may validly require employers to make payments to the State for the vocational rehabilitation of injured employees in addition to their liability to compensate the injured employee;⁸⁹ and a statute that imposes on a third party whose negligence caused the injury for which an employer has made compensation the duty to reimburse the employer for contributions to such fund do not deprive the wrongdoer of his property without due process of law.⁹⁰ Considerations of administrative convenience justify exempting small employers from the provisions of workmen's compensation acts, and this denies equal protection of the law to neither the excluded employers or employees nor the included employers or employees.⁹¹ It has been held that non-resident alien beneficiaries of employees may be discriminated against,⁹² or entirely excluded from,⁹³ the provisions of such acts. The workmen's compensation legislation that has thus far been sustained has been limited to hazardous employments, but much of the reasoning would justify its extension to non-hazardous employments as well. Its scope can be practically extended by judicial willingness to accept legislative judgments as to what are hazardous employments.⁹⁴ Due process, however, would invalidate any attempt to make an employer liable to an employee for an injury in no manner related to his employment,⁹⁵ but courts have been liberal in defining the injuries that may reasonably be held attributable to employment.⁹⁶ Liberty of contract is not unconstitutionally restricted by prohibiting contracts interfering with the policies embodied in em-

⁸⁸ *Mountain Timber Co. v. Washington*, 243 U.S. 219, 37 S.Ct. 260, 61 L.Ed. 685, Ann.Cas.1917D, 642. This provision was sustained in part as an exercise of the taxing power.

⁸⁹ *Sheehan Co. v. Shuler*, 265 U.S. 371, 44 S.Ct. 548, 68 L.Ed. 1061, 35 A.L.R. 1056.

⁹⁰ *Staten Island Rapid Transit Ry. Co. v. Phoenix Indemnity Co.*, 281 U.S. 98, 50 S.Ct. 242, 74 L.Ed. 726.

⁹¹ *Jeffrey Mfg. Co. v. Blagg*, 235 U.S. 571, 35 S.Ct. 167, 59 L.Ed. 364; *Middleton v. Texas Power & Light Co.*, 249 U.S. 152, 39 S.Ct. 227, 63 L.Ed. 527.

⁹² *Maryland Casualty Co. v. Cham-os*, 203 Ky. 820, 263 S.W. 370.

⁹³ *Gregutis v. Waclark Wire Works*, 86 N.J.L. 610, 92 A. 354.

⁹⁴ *Ward & Gow v. Krinsky*, 259 U.S. 503, 42 S.Ct. 529, 66 L.Ed. 1033, 28 A.L.R. 1207.

⁹⁵ *Cudahy Packing Co. of Nebraska v. Parramore*, 263 U.S. 418, 44 S.Ct. 153, 68 L.Ed. 366, 30 A.L.R. 532.

⁹⁶ *Bountiful Brick Co. v. Giles*, 276 U.S. 154, 48 S.Ct. 221, 72 L.Ed. 507, 66 A.L.R. 1402.

ployers' liability and workmen's compensation acts.⁹⁷ The principal factor that has induced judicial acceptance of these modern substitutes for the common law system of distributing the losses resulting from industrial accidents and injuries has been the recognition of the socially undesirable results of the common law system and of the reasonableness of methods for promoting the distribution of such losses over the community at large in the same manner as other costs of production are spread.

Social Security Legislation

It has come to be a widely accepted view that the costs of maintaining superannuated workers and of unemployment should be distributed as part of the costs of production of commodities and services instead of being either borne immediately by the unemployed or imposed upon the general public to be defrayed by general taxation. This has led to legislation establishing compulsory retirement and pension systems, and unemployment insurance systems, that have generally provided for the creation of funds controlled and administered by public authorities to which employers alone, or both employers and employees, have been compelled to make financial contributions. Legislation of this character has also specified those entitled to distributions from funds thus created, and the conditions precedent to their right to share therein. It has in some instances been predicated on the power of government to regulate and in others on its taxing power. The power of the federal government to impose such systems by way of regulation can be exercised only so far as it lies within its delegated powers, and even then is its exercise thereof subject to the due process clause of the Fifth Amendment.⁹⁸ The principal limits on the states' power to enact such legislation are found in the provisions of the Fourteenth Amendment to the federal Constitution and similar provisions of their respective state constitutions. It has been held that due process is violated by the provisions of a retirement plan so far as it (a) required the employers to pay pensions to all who had been in their employ within one year prior to the enactment of the statute establishing the system irrespective of any future

⁹⁷ *Mondou v. New York, N. H. & H. R. Co.*, 223 U.S. 1, 32 S.Ct. 169, 56 L.Ed. 327, 38 L.R.A.,N.S., 44; *Philadelphia, B. & W. R. Co. v. Schubert*, 224 U.S. 603, 32 S.Ct. 589, 56 L.Ed. 911 (case in which contract antedated enactment of the statute.)

⁹⁸ The Railroad Retirement Act 45 U.S.C.A. §§ 201-214, was, for example, held to be outside the federal power to regulate interstate commerce; *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330, 55 S.Ct. 758, 79 L.Ed. 1468.

re-employment, (b) measured the pension payable by the total years of employment in the industry to which the system applied regardless of whether such employment had been by the employer required to pay the pension or by another in that industry, (c) based the amount payable on employment prior to the enactment of the statute during which the employees had made no contribution, (d) required the payment of pensions to those who had contributed nothing to the pension fund, (e) included among employees the representatives of employees' organizations who, after ceasing to be employed, continued to pay into the pension fund, and (f) treated all the individual employers as a unit and thus produced a discrepancy between the contributions of an individual employer to the fund and his draft thereon to pay pensions to his own retired employees.⁹⁹ It has, however, been held that an employer's property is not being taken without due process merely because he is required to contribute to a fund from which payments were to be made to the unemployed.¹ This was sustained whether viewed as an exercise of the state's police power or its taxing power. It was also held not to violate the equal protection clause as taxation of a part of the public for the benefit of a special group, or because it excluded some employers. Similar state acts were sustained as exercises of a state's police power to deal with an admitted evil.² It was held not to violate due process to place the cost on those in connection with whose business the evils arose, to require greater contributions from employers than from employees, and to place the contributions of all employers in a single fund with the result that a given employer's contributions might be used to pay benefits to unemployed employees of other employers.³ It has recently been finally determined that an employer's property is not being taken without due process by a tax whose proceeds are covered into a fund from which unemployment compensation is paid even though the particular employer may not have contributed to the unemployment and may derive no benefit from the uses to which the proceeds of the tax are applied. The tests of the validity of such a system based on an exercise

⁹⁹ See case cited in footnote 98.

¹ *W. H. H. Chamberlin, Inc. v. Andrews*, 271 N.Y. 1, 2 N.E.2d 22, affirmed per curiam, 299 U.S. 515, 57 S.Ct. 122, 81 L.Ed. 380.

² *Howes Bros. Co. v. Massachusetts Unemployment Compensation*

Commission, — Mass. —, 5 N.E.2d 720; *Gillum v. Johnson*, 7 Cal.2d 744, 62 P.2d 1037, 63 P.2d 810, 108 A.L.R. 595.

³ *Howes Bros. Co. v. Massachusetts Unemployment Compensation Commission*, — Mass. —, 5 N.E.2d 720.

of the taxing power are not those applied in determining the consonance of exercises of a state's police power with the requirements of the due process clause of the Fourteenth Amendment, but those employed in defining the limitations imposed by that clause on a state's taxing power. The use of the funds derived from such a tax to pay unemployment compensation is their use for a valid public purpose within the meaning of that clause. It is not arbitrary to extend the benefits of the system to those discharged for misconduct. Nor is the equal protection clause of the Fourteenth Amendment violated by exempting small employers and the employers of agricultural labor and of domestic servants from the tax, or by limiting those entitled to compensation to employees of the taxed employers.⁴ Similar exemptions in the federal Unemployment Insurance Act were held not to violate the due process clause of the Fifth Amendment.⁵ The integration of state and federal unemployment compensation plans into a single voluntary co-operative system for dealing with the problem of unemployment involves neither the surrender by a state of its constitutional sphere of independent action nor an invalid invasion of state powers by the federal government.⁶ The use of the federal tax power to establish a system of old age pensions has been sustained as a valid exercise of that power and as not violative of the due process clause of the Fifth Amendment.⁷ The decision sustaining such use of the federal tax power, and those sustaining state unemployment compensation systems, indicate that state old age pension systems financed by taxation of employers or employees or both would be valid in principle and in detail so far as not wholly arbitrary in their classifications. The availability of the state and federal taxing powers as instruments for establishing state and federal unemployment compensation and old age pension systems has made resort to their respective regulatory powers unnecessary. The case of *Railroad Retirement Board v. Alton Railroad Co.*⁸ has been rendered comparatively innocuous by the approach predicated on the powers of taxation.⁹

⁴ *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 57 S.Ct. 868, 81 L.Ed. 1245, 109 A.L.R. 1327.

⁵ *Chas. C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279, 109 A.L.R. 1293. The Act involved was an exercise of the federal tax power.

⁶ See cases cited in footnote 4 and 5.

⁷ *Helvering v. Davis*, 301 U.S. 619, 57 S.Ct. 904, 81 L.Ed. 1307, 109 A.L.R. 1319.

⁸ 295 U.S. 330, 55 S.Ct. 758, 79 L.Ed. 1468.

⁹ The provision of pensions for

Trade Unionism and Industrial Controversies

The state has an interest in maintaining the peace against disturbances incident to industrial conflicts, and also has a vital interest in promoting and maintaining continuity in its industrial and other economic activities. The protection of these interests justifies it in placing important limitations on the freedom of action of both employers and employees. The law as to the limits placed on that power by the requirements of the due process and equal protection clauses is still in its formative stages. The constitutionally protected freedom of contract includes the right of an individual employer and individual employee to enter into a labor contract,¹⁰ and thus far the courts have not yet had to determine whether a statute prohibiting such contracts and requiring collective bargaining would be valid. The right of employees to form unions for the promotion of their economic interests has received repeated judicial sanction, and occasion has not yet arisen for the judicial determination of how far this right may be curtailed consistently with the provisions of due process clauses. The course of legislation has rather raised issues as to the constitutionality of governmental attempts to protect this right or to actively promote the spread of unionism and collective bargaining.¹¹ It has been held that a statute prohibiting employers from requiring agreements not to join, or continue membership in, a union as a condition to securing employment or continuing therein, and making the violation of that statute a misdemeanor, deprived employers of their freedom of

public employees is generally held not to violate state constitutional provisions against the loan of the public credit, or the use of the taxing power, for other than public purposes; *Bowler v. Nagel*, 228 Mich. 434, 200 N.W. 258, 37 A.L.R. 1154; *State ex rel. Haberman v. Love*, 89 Neb. 149, 131 N.W. 196, 34 L.R.A., N.S., 607, Ann.Cas.1912C, 542; contra, *State ex rel. Heaven v. Ziegenheim*, 144 Mo. 283, 45 S.W. 1099, 66 Am.St. Rep. 420.

¹⁰ *Adair v. U. S.*, 208 U.S. 161, 28 C.Ct. 277, 52 L.Ed. 436, 13 Ann.Cas. 764; *COPPAGE v. KANSAS*, 236 U.S. 1, 35 S.Ct. 240, 59 L.Ed. 441, L.R.A.1915C, 960, Black's Cas. Constitutional Law, 2d, 479.

¹¹ Statutes and ordinances requiring all public printing or other public work to be done by union labor, or requiring union labels on goods purchased by public authorities, have generally been held to conflict with the due process and equal protection clauses of the Fourteenth Amendment, U.S.C.A.Const. Amend. 14, and similar provisions of state constitutions; *Wright v. Hootor*, 95 Neb. 342, 145 N.W. 704, 146 N.W. 997, 52 L.R.A., N.S., 728, Ann.Cas.1915D, 967; *Fiske v. People ex rel. Raymond*, 188 Ill. 206, 58 N.E. 985, 52 L.R.A. 291; *Marshall & Bruce Co. v. Nashville*, 109 Tenn. 495, 71 S.W. 815; *Miller v. City of Des Moines*, 143 Iowa 409, 122 N.W. 226, 23 L.R.A., N.S., 815, 21 Ann.Cas. 207.

contract in violation of the due process clause of the Fourteenth Amendment,¹² and that a statute making it a misdemeanor for an employer or his agent to discharge an employee because of his union membership violated the due process clause of the Fifth Amendment.¹³ Statutes denying enforceability to such agreements but imposing no criminal penalties for requiring them from employees or for discharging employees because of union membership have also been held violative of due process.¹⁴ The course of recent decisions, however, is inconsistent with those decisions. The provisions of the federal Railway Labor Act of 1926, 45 U. S.C.A. § 151 et seq., requiring the representatives of the parties to an industrial dispute to be designated by them without interference, influence or coercion by the other party were held consistent with due process though they prevented the employer from fostering a company union.¹⁵ The power of Congress to recognize the employees' right to collective bargaining as an instrument for peace in interstate transportation was held to justify imposing conditions that would make that right effective. The rights of employers under the due process clause of the Fifth Amendment are not violated by a statute that confers upon employees the rights of self-organization and collective bargaining, prohibits employers from interfering therewith, and prohibits them by discriminations in respect of terms of employment and tenure to encourage or discourage membership in any labor organization.¹⁶ The case held that employers could be compelled to offer employees discharged for union activities reinstatement in their jobs. In another case they were required to desist from threatening to discharge employees for such reason.¹⁷ That state statutes affording similar protection to the rights of labor to self-organization and collective bargaining would be consistent with the due process clause of the Fourteenth

¹² *COPPAGE v. KANSAS*, 236 U. S. 1, 35 S.Ct. 240, 59 L.Ed. 441, L.R. A.1915C, 960, Black's Cas. Constitutional Law, 2d, 479.

¹³ *Adair v. United States*, 208 U.S. 161, 28 S.Ct. 277, 52 L.Ed. 436, 13 Ann.Cas. 764.

¹⁴ In re Opinion of the Justices, 271 Mass. 598, 171 N.E. 234; In re Opinion of the Justices, 275 Mass. 580, 176 N.E. 649; In re Opinion of the Justices, 86 N.H. 597, 166 A. 640.

¹⁵ *Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks*, 281 U.S. 548, 50 S.Ct. 427, 74 L.Ed. 1034.

¹⁶ *NATIONAL LABOR RELATIONS BOARD v. JONES & LAUGHLIN STEEL CORP.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893, 108 A. L.R. 1352, Black's Cas. Constitutional Law, 2d, 247.

¹⁷ *National Labor Relations Board v. Fruehauf Trailer Co.*, 301 U.S. 49, 57 S.Ct. 642, 81 L.Ed. 918, 108 A. L.R. 1352.

Amendment is an inescapable conclusion from these decisions. The cases of *Adair v. United States* and *Coppage v. Kansas* have been effectively devitalized. The power of government to protect the rights of labor has not yet been held to permit it to compel employers to enter into collective bargains or to prohibit them from entering into individual labor contracts with their employees, nor yet to compel employees to join labor unions.¹⁸ The power to provide that, so far as collective bargaining is resorted to, the majority of an employer's employees shall represent them all was sustained without argument in the case last cited. Reasonable restrictions on individual freedom to protect the system of individual bargaining between employers and employees are equally compatible with due process.¹⁹

The state's interest in the continuity of its industrial and economic life does not justify it in imposing upon an ordinary business a system of compulsory arbitration of industrial disputes since that would compel both employer and employee to continue in business on terms which are not of their own making. Such a system has been held to infringe the liberty of contract and rights of property guaranteed by the due process clause of the Fourteenth Amendment.²⁰ It has been explicitly stated, however, that the enforcement of such a system on the railroads and their employees would not produce any unconstitutional interference with the private rights of either party,²¹ and the same reasoning would justify its enforcement in the field of other public utilities. It is equally valid to impose upon employers in those industries a legal duty to negotiate with the representatives of their employees for the settlement of issues between them.²² The reasons relied upon to sustain this position were not specific to this industrial field, and it is a reasonable inference that the same

¹⁸ See remarks in *NATIONAL LABOR RELATIONS BOARD v. JONES & LAUGHLIN STEEL CORP.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893, 108 A.L.R. 1352, *Black's Cas. Constitutional Law*, 2d, 247.

¹⁹ *Rhoden v. State*, 161 Ga. 73, 129 S.E. 640.

²⁰ *Chas. Wolff Packing Co. v. Court of Industrial Relations of State of Kansas*, 262 U.S. 522, 43 S.Ct. 630, 67 L.Ed. 1103, 27 A.L.R. 1280; *CHAS. WOLFF PACKING CO. v. COURT OF INDUSTRIAL RELA-*

TIONS OF STATE OF KANSAS, 267 U.S. 552, 45 S.Ct. 441, 69 L.Ed. 785, *Black's Cas. Constitutional Law*, 2d, 488 (meat packing); *Dorchy v. State of Kansas*, 264 U.S. 286, 44 S.Ct. 323, 68 L.Ed. 686 (coal mining).

²¹ *Wilson v. New*, 243 U.S. 332, 37 S.Ct. 298, 61 L.Ed. 755, *L.R.A.1917E*, 938, *Ann.Cas.1918A*, 1024.

²² *Virginian Ry. Co. v. System Federation No. 40, Railway Employees Dept. of American Federation of Labor*, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789.

duty could be imposed upon employers in ordinary businesses.²³ Government may also invoke the method of investigation, and publication of the findings of such investigations, in order to bring the pressure of public opinion to its aid in carrying into effect its policies in the matter of employer-employee relations, and in that connection compel the giving of testimony before its investigatory agencies.²⁴ Such measures do not deprive employers of their liberty or property without due process of law. It has been held, however, to be an unwarranted invasion of freedom of contract to require newspapers to publish the findings of such investigations at their regular advertising rates and to make refusal to do so a crime.²⁵ There is, however, no practical method of compelling parties to agree if the method of compulsory arbitration is excluded, and strikes may be expected to indefinitely remain an incident to industrial disputes. The right to strike has received extensive legal recognition, but is not beyond the power of government to regulate, and the due process clauses of the Fifth and Fourteenth Amendments do not confer an absolute right to strike.²⁶ A state may, accordingly, make it a crime to induce employees to strike to promote an objective which it may reasonably declare to be unlawful.²⁷ The right of the employer to carry on his business is a property right which the state is at liberty to protect against interference without just cause, and a strike to coerce an employer to pay a former employee a disputed claim may reasonably be held by the state to be without just cause.²⁸ The due process clauses, however, do not guarantee that an employer's hoped for patronage or jobs shall not be diverted to others by the peaceful and law-

²³ See NATIONAL LABOR RELATIONS BOARD v. JONES & LAUGHLIN STEEL CORPORATION, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893, 108 A.L.R. 1352, Black's Cas. Constitutional Law, 2d, 247.

²⁴ Holcombe v. Creamer, 231 Mass. 99, 120 N.E. 354; Moore Drop Forging Co. v. Board of Conciliation & Arbitration, 239 Mass. 434, 132 N.E. 169. See Pennsylvania R. Co. v. U. S. Railroad Labor Board, 261 U.S. 72, 43 S.Ct. 273, 67 L.Ed. 536, and Pennsylvania Railroad System & Allied Lines Federation No. 90 v. Pennsylvania R. Co., 267 U.S. 203, 45 S.Ct. 307, 69 L.Ed. 574.

²⁵ Commonwealth v. Boston Transcript Co., 249 Mass. 477, 144 N.E. 400, 35 A.L.R. 1. The court in this case relied upon state constitutional provisions only, but its reasoning follows the pattern used in determining the validity of regulations under the due process clauses of the federal Constitution.

²⁶ Dorchy v. Kansas, 272 U.S. 306, 47 S.Ct. 86, 71 L.Ed. 248.

²⁷ Same case as footnote 26.

²⁸ Same case as footnote 26.

ful activities of a union to whose reasonable rules he has refused to subscribe, and a rule that would have prevented him from doing work on his own jobs of the kind performable by the union's members is a reasonable method for protecting the interests of the members of the union even though the employer was excluded from membership therein.²⁹ A state may also intervene to regulate the incidents of strikes. The form of intervention that has most frequently raised constitutional problems consists of statutes authorizing labor to give publicity to labor disputes, legalizing specified forms of peaceful picketing, and prohibiting courts from enjoining such conduct. Statutes prohibiting the issuance of injunctions in labor disputes were at first held a denial of due process and equal protection to the affected employers.³⁰ The recent trend has been to sustain them against these objections so far as they prohibit enjoining peaceful picketing,³¹ even where there is no dispute between the affected employer and his employees and the picketing is the act of strangers intent on forcing upon him a closed shop.³² It is still correct law, however, that the prohibition of injunctions against unlawful conduct by pickets which injures the employer's property interests, including his interest in the custom of his patrons, denies him due process and violates the equal protection clause because limited to unlawful injuries inflicted by striking former employees.³³ The legalization of peaceful picketing as an incident to a lawful strike denies no one due process.³⁴ It is, however, equally the law that due process is not denied em-

²⁹ *SENN v. TILE LAYERS PROTECTIVE UNION*, 301 U.S. 468, 57 S.Ct. 857, 81 L.Ed. 1229, *Black's Cas. Constitutional Law*, 2d, 481.

³⁰ *In re Opinion of the Justices*, 271 Mass. 598, 171 N.E. 234; *In re Opinion of the Justices*, 275 Mass. 580, 176 N.E. 649; *In re Opinion of the Justices*, 86 N.H. 597, 166 A. 640.

³¹ *Fenske Bros. v. Upholsterers' International Union of North America*, Local No. 18, 358 Ill. 239, 193 N.E. 112, 97 A.L.R. 1318; *American Furniture Co. v. I. B. of T. C. & H. of A. Chauffeurs, Teamsters & Helpers General Local No. 200 of Milwaukee*, 222 Wis. 338, 268 N.W. 250, 106 A.L.R. 335.

³² *American Furniture Co. v. I. B. of T. C. & H. of A. Chauffeurs, Teamsters & Helpers General Local No. 200 of Milwaukee*, 222 Wis. 338, 268 N.W. 250, 106 A.L.R. 335; *SENN v. TILE LAYERS PROTECTIVE UNION*, 301 U.S. 468, 57 S.Ct. 857, 81 L.Ed. 1229, *Black's Cas. Constitutional Law*, 2d, 481.

³³ *Truax v. Corrigan*, 257 U.S. 312, 42 S.Ct. 124, 66 L.Ed. 254, 27 A.L.R. 375.

³⁴ *SENN v. TILE LAYERS PROTECTIVE UNION*, 301 U.S. 468, 57 S.Ct. 857, 81 L.Ed. 1229, *Black's Cas. Constitutional Law*, 2d, 481.

ployees by a complete prohibition of all picketing.³⁵ The flexibility of the constitutional provisions invoked in cases involving labor disputes is such as to permit completely opposing policies as the legislative discretion may determine.

Miscellaneous Regulations of Labor

The states may not establish unreasonable classifications in regulating the right to work and the employer's right to hire workers. It has been held a denial of equal protection to resident aliens to prohibit private employers from employing aliens in excess of a limited percentage of the total number of their employees.³⁶ The requirements of the Fourteenth Amendment do not, however, prevent a state from imposing such regulations in connection with public works whether performed by public bodies or by private contractors.³⁷ Statutes requiring corporate employers to give their employees service letters after leaving their employ, if the employees request such letters, do not interfere invalidly with the freedom of contract of either employers or employees, and the equal protection clause is not violated by limiting the duty to corporate employers.³⁸ It can be safely stated that the validity of governmental regulations of the relation of employer and employee is determined by the same test of reasonableness applied in connection with other fields of regulation.³⁹

³⁵ *Thomas v. City of Indianapolis*, 195 Ind. 440, 145 N.E. 550, 35 A.L.R. 1194; *Watters v. City of Indianapolis*, 191 Ind. 671, 134 N.E. 482; *Hardie-Tynes Mfg. Co. v. Cruise*, 189 Ala. 66, 66 So. 657; *In re Williams*, 158 Cal. 550, 111 P. 1035.

³⁶ *Truax v. Raich*, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131, L.R.A.1916D, 545, Ann.Cas.1917B, 283.

³⁷ *Heim v. McCall*, 239 U.S. 175, 36 S.Ct. 78, 60 L.Ed. 206, Ann.Cas. 1917B, 287.

³⁸ *Prudential Ins. Co. of America v. Cheek*, 259 U.S. 530, 42 S.Ct. 516, 66 L.Ed. 1044, 27 A.L.R. 27.

³⁹ See following cases considering various aspects of labor legislation:

Bowersock v. Smith, 243 U.S. 29, 37 S.Ct. 371, 61 L.Ed. 572 (sustaining statute requiring safety measures in factories); *Barrett v. Indiana*, 229 U.S. 26, 33 S.Ct. 692, 57 L.Ed. 1050 (sustaining statute requiring proper ventilation and other healthful conditions in mines); *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531, 34 S.Ct. 359, 58 L.Ed. 713 (*Idem*); *Booth v. Indiana*, 237 U.S. 391, 35 S.Ct. 617, 59 L.Ed. 1011 (sustaining statute requiring employers to furnish wash rooms); *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U.S. 404, 19 S.Ct. 419, 43 L.Ed. 746 (sustaining statute requiring railroads' payment of wages earned but not yet due immediately after discharge of an employee).

REGULATION OF PROPERTY AND ITS USE

244. The due process clause of the Fourteenth Amendment to the federal Constitution provides that no state shall deprive any person of property without due process of law. It is a limit on the states in exercising their police power in regulating the creation and transfer of interests in property, its disposition, and its use. The state governments are also limited in exercising their police powers in these fields by similar provisions in their respective state constitutions.
245. The due process clause of the Fifth Amendment to the federal Constitution, providing that no person shall be deprived of his property without due process of law, imposes similar limitations on the federal government in exercising such regulatory powers as it possesses over property and interests therein.
246. The equal protection clause of the Fourteenth Amendment to the federal Constitution prohibits the states from making unreasonable classifications in exercising their police power in the regulation of property and its use.

The right of private property represents an important human interest, and also constitutes an indispensable element in a society that relies as heavily as ours has in the past upon private individual initiative and activity to realize its objectives. The bundle of legal relations that constitute property in the legal sense of that term generally has as its object physical things, although its immediate object may sometimes be a factual complex of other intangible relations. The character, number and scope of the legal relations constituting property in our legal systems are the product of an historical development. The particular relations that have for a long time been considered the most significant for our form of social and economic organization, and are still considered such, include the right of the owner to exclude others from it or its uses without his consent, his privileges of using it, and his power to dispose of it. The due process clause of the Fourteenth Amendment and similar provisions of the constitutions of the several states limit the states in their control of each and all of these elements of property, and the due process clause of the Fifth Amendment limits the federal government in its control thereof. These provisions prohibit the states and the federal government, respectively, from depriving any person of property without due process of law.

The usual effect of any regulation is to curtail to some extent the rights⁴⁰ of the owner of property, and deprive him to that extent of what was formerly a part of his property. It is not every such regulation that constitutes a deprivation of property without due process. The requirement of due process is satisfied if the regulation is reasonable, and the principal factors bearing on that issue are the degree and intensity of the regulation and the extent to which it is justified by the resulting public benefits. There are pressing public advantages so great that an actual appropriation or destruction of property without specific compensation paid the owner therefor are sustained as reasonable.⁴¹ The majority of the problems that have arisen in the application of these constitutional provisions have, however, concerned regulations involving neither the appropriation nor destruction of the property.

Kind and Character of Property that may be Privately Owned

It has been, and continues to be, an important element in our socio-legal theories that the right of private property may have as its object practically any tangible or intangible thing. A state has, however, a limited power to exclude certain things from the class of objects in which it will recognize rights of private property that can be asserted against the state itself. Thus statutes enacted to aid the enforcement of a prohibition of the manufacture and sale of intoxicating liquors, that made the possession of such liquors, even for private use in the home, illegal, and deprived them of their character of property, have been held not to deprive those, who had acquired them prior to the enactment of the statutes, of their property without due process of law.⁴² The possession of nets and other equipment capable of use in the violation of a state's game laws may validly be prohibited, regardless of the time of their acquisition or the protestations of lawful intentions on the part of a particular possessor.⁴³

⁴⁰ The term "rights" is here used in its broad sense to denote not only "rights" in the narrower sense, but also powers and privileges. The context will indicate the sense in which it is used in the subsequent discussion.

⁴¹ See remarks of Mr. Justice Holmes in *Pennsylvania Coal Co. v.*

Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322, 28 A.L.R. 1321.

⁴² *Samuels v. McCurdy*, 267 U.S. 188, 45 S.Ct. 264, 69 L.Ed. 568, 37 A.L.R. 1378; *Barbour v. Georgia*, 249 U.S. 454, 39 S.Ct. 316, 63 L.Ed. 704; *Crane v. Campbell*, 245 U.S. 304, 38 S.Ct. 98, 62 L.Ed. 304.

⁴³ *Miller v. McLaughlin*, 281 U.S. 261, 50 S.Ct. 296, 74 L.Ed. 840.

The same principles justify a state in declaring the possession of gambling devices illegal. It has also been held valid to make it a crime for a person, who had ever been convicted of a felony (whether by the state enacting the statute or another), to possess a pistol even though acquired prior to the time that the statute took effect.⁴⁴ Statutes of this character generally provide for the seizure of the property illegally held and its forfeiture to the state, and these provisions are equally sustained as consonant with the requirement of due process.⁴⁵ Their effect is, accordingly, to deny the right of private property against the claims of the state only. They do not determine how far the state could validly deny the factual possessor of such things legal protection against attacks thereon by other private persons. It is certain that its power in that respect would be more limited, but quite probable that it is not wholly non-existent. Statutes of the character thus far considered in this paragraph are to be distinguished from those denying the right of private property in certain things without providing for their seizure by, and forfeiture to, the state. A statute prohibiting the private ownership of capital goods would furnish an example of that kind. The problems raised by statutes of that kind would become entangled with those of the extent of the states' power to prohibit private business activities in lines not requiring for their prosecution the exercise of special franchises or such governmental powers as that of eminent domain, and with those of the extent to which a state may itself validly enter the fields of business and industry. Existing decisions do not justify any pronouncement on this problem.

Creation, Definition, and Transfer of Interests in Property

A state has broad powers to determine the rules of property for property within its jurisdiction, however limited may be its power to deny the right of private property completely. This includes the power to define the character of interests therein to which it will accord legal recognition. Due process does not require it to permit dower rights to be acquired in lands situated within it,⁴⁶ nor does it violate the equal protection clause to discriminate in

⁴⁴ *People v. Camperlingo*, 69 Cal. App. 466, 231 P. 601; *People v. McCloskey*, 76 Cal.App. 227, 244 P. 930.

⁴⁶ *Thornburn v. Doscher*, C.C., 32 F. 810; *Ferry v. Spokane, P. & S. R. Co.*, 258 U.S. 314, 42 S.Ct. 358, 66 L.Ed. 635, 20 A.L.R. 1326.

⁴⁵ See cases cited in footnotes 42 and 43.

favor of resident wives against non-resident wives in defining the conditions under which, and the extent to which, dower rights shall exist in lands within the state.⁴⁷ Neither does it prevent a state from substituting for a riparian owner's right to the natural flow of non-navigable waters a system of apportioning the waters under state authority, even as to lands acquired before the statute.⁴⁸ The right to acquire property is not unlimited, and its exercise may be prohibited to promote a legitimate governmental policy such as the prevention of monopoly.⁴⁹ A state may also limit the extent to which it will give legal protection to what it itself recognizes as property, if any reasonable basis exists therefor. A statute providing that no dog shall be entitled to the protection of the law unless placed on the assessment rolls, and denying the owner the right to recover a greater value than that fixed by him on such rolls in case of its injury by another's negligence, does not deprive the owner of his property without due process of law.⁵⁰ Due process is, however, denied an owner of a dog by a statute authorizing the uncompensated killing by private persons of any unlicensed dog, or any licensed dog not wearing its license tag, or any dog trespassing on premises where sheep were kept regardless of the degree of danger to sheep from such animal. The denial of legal protection was deemed too extreme in this case.⁵¹ The denial of effective protection to an employer's property against unlawful acts of strikers has also been held to deny employers due process of law.⁵² The principle underlying these decisions is that the degree of legal protection that must be accorded private property against acts of government and of private persons depends on the character of the property and the extent to which limiting such protection can be justified as a reasonable means for promoting a legitimate public benefit. A state may also impose conditions upon the right to own private property, at least against its own claims, by requiring its consent thereto, as by requiring licensing for dogs and other animals,

⁴⁷ *Ferry v. Spokane, P. & S. R. Co.*, 258 U.S. 314, 42 S.Ct. 358, 66 L.Ed. 635, 20 A.L.R. 1326; *Buffington v. Grosvenor*, 46 Kan. 730, 27 P. 137, 13 L.R.A. 282; *Miner v. Morgan*, 83 Neb. 400, 119 N.W. 781.

⁴⁸ *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 9 Cir., 73 F.2d 555.

⁴⁹ *Northern Securities Co. v. U. S.*,

193 U.S. 197, 24 S.Ct. 436, 48 L.Ed. 679.

⁵⁰ *Sentell v. New Orleans & C. R. Co.*, 166 U.S. 698, 17 S.Ct. 693, 41 L. Ed. 1169.

⁵¹ *Kasch v. Anders*, 318 Ill. 272, 149 N.E. 275.

⁵² *Truax v. Corrigan*, 257 U.S. 312, 42 S.Ct. 124, 66 L.Ed. 254, 27 A.L.R. 375.

since this is a reasonable regulation to promote the public welfare.⁵³ It is probable that it would be held unreasonable to extend this form of regulation to every kind of property. A state may determine who shall be permitted to own property within its borders, but this too is subject to the limitations found in the due process and equal protection clauses of the Fourteenth Amendment. The issue of the extent of its powers in this matter has arisen most frequently in connection with legislation dealing with the rights of certain classes of aliens to own agricultural lands or interests therein. Prohibiting the direct or indirect ownership of such lands by aliens ineligible for federal citizenship does not deny them either due process or the equal protection of the laws,⁵⁴ nor does it deny the owner of such lands due process to prohibit their lease to such aliens or the making of cropper contracts for their operation by such aliens.⁵⁵ A general prohibition against the ownership of all classes of property by aliens would deprive them of both due process and equal protection.⁵⁶ The cases involving these alien land laws show that the validity of excluding particular classes from the right to own any given kind of property depends upon the reasonableness of the restriction and of the selection of the particular class upon which it is imposed.

The regulation of the transfer of property and interests therein is as much within the power of the state in which the property is situated as is the definition of the interests therein which it will recognize. The right of an owner to dispose of his property may be regulated by requiring compliance with prescribed formalities as is the case with transfers of real property and transfers by will. It is quite generally stated that an owner's right to dispose of his property by will is not a natural right but a creature of statute.⁵⁷ This has been affirmed most frequently in

⁵³ *Nicchia v. New York*, 254 U.S. 228, 41 S.Ct. 103, 65 L.Ed. 235, 13 A.L.R. 826.

⁵⁴ *Porterfield v. Webb*, 263 U.S. 225, 44 S.Ct. 21, 68 L.Ed. 278; *Frick v. Webb*, 263 U.S. 326, 44 S.Ct. 115, 68 L.Ed. 323 (statute forbade transfer to such aliens of shares of stock in a corporation owning such lands).

⁵⁵ *Terrace v. Thompson*, 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255; *Webb v. O'Brien*, 263 U.S. 313, 44 S.Ct. 112, 68 L.Ed. 318.

⁵⁶ *Truax v. Raich*, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131, L.R.A.1916D, 545, Ann.Cas.1917B, 283. The statement in the text is a reasonable implication of the theory on which the case was decided.

⁵⁷ *Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283, 18 S.Ct. 594, 42 L.Ed. 1037; *In re Stanford's Estate*, 126 Cal. 112, 54 P. 259, 58 P. 462, 45 L.R.A. 788.

cases justifying the imposition of inheritance and estate taxes on the exercise of that right. The issue of the validity under due process provisions of a statute that completely abolished this right has never been determined, although a state's power to curtail it in various ways and to deny it as to part of a decedent's property has gone unquestioned. The right to dispose of property by inter vivos transfers may also be subjected to reasonable regulation, and may even be completely prohibited if reasonably necessary to promote a valid public end. The sale of intoxicating liquors may be prohibited even though they were owned at the time the prohibitory statute took effect,⁵⁸ as may the sale of non-intoxicating beverages since that is held to be reasonably necessary to make effective the prohibition of the sale of intoxicants.⁵⁹ The protection of the public health justifies prohibiting the sale of food preservatives containing ingredients injurious to health,⁶⁰ of foods not meeting reasonable standards of purity⁶¹ or reasonably deemed injurious to public health,⁶² and of nostrums by itinerant vendors.⁶³ The provisions of "Blue-Sky Laws" that prohibit the sale of securities not approved by designated public authorities have been sustained as valid measures for the protection of the investing public against fraud,⁶⁴ and similar considerations have been invoked to sustain the validity of "Bulk-Sales Acts."⁶⁵ Statutes prohibiting the assignment of wages, and requiring every such assignment to be considered as a loan, have been justified as reasonable measures to protect necessitous borrowers against having undue advantage taken of their needs.⁶⁶

⁵⁸ *Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205.

⁵⁹ *Purity Extract & Tonic Co. v. Lynch*, 226 U.S. 192, 33 S.Ct. 44, 57 L.Ed. 184.

⁶⁰ *Price v. Illinois*, 238 U.S. 446, 35 S.Ct. 892, 59 L.Ed. 1400.

⁶¹ *St. John v. New York*, 201 U.S. 623, 26 S.Ct. 554, 50 L.Ed. 896, 5 Ann.Cas. 909 (milk).

⁶² *Powell v. Pennsylvania*, 127 U.S. 678, 8 S.Ct. 992, 1257, 32 L.Ed. 253 (oleomargarine); see *John F. Jelke Co. v. Emery*, 193 Wis. 311, 214 N.W. 369, 53 A.L.R. 463, contra, the court taking the position that *Powell v. Pennsylvania* had been overruled by later decisions.

⁶³ *Baccus v. Louisiana*, 232 U.S. 334, 34 S.Ct. 439, 58 L.Ed. 627.

⁶⁴ *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U.S. 559, 37 S.Ct. 224, 61 L.Ed. 493; *Merrick v. N. W. Halsey & Co.*, 242 U.S. 568, 37 S.Ct. 227, 61 L.Ed. 498. It has been held to deny both due process and equal protection to prohibit an owner from making a series of sales of stock, *People v. Pace*, 73 Cal.App. 548, 238 P. 1089; contra, *State v. Barrett*, 121 Or. 57, 254 P. 198; *State v. Gerritson*, 124 Or. 525, 265 P. 422.

⁶⁵ *Lemieux v. Young*, 211 U.S. 439, 29 S.Ct. 174, 53 L.Ed. 295.

⁶⁶ *Palmore v. Baltimore & O. R. Co.*, 156 Md. 4, 142 A. 495; *Sweat*

Provisions of this kind have generally constituted integral parts of Small Loan Acts. The right to assign wages may also be validly conditioned on procuring the consent of the assignor's wife although her consent can not be legally forced.⁶⁷ The prohibition of margin sales of stocks, and the sale of futures on commodity markets, do not impose an unreasonable restriction of the right to dispose of property and to make contracts with respect thereto.⁶⁸ A state may validly prohibit contracts to sell in any case in which it may validly prohibit the consummation of a sale. The foregoing instances reflect the judicial attitude of sustaining legislative limitation of the right of an owner to dispose of his property whenever the legislative judgment that such limitation is reasonably necessary to promote the general welfare is not palpably arbitrary. The same kind of considerations have been invoked to sanction state legislation that effected a transfer of the property of one person to another private person by attaching that result to certain conduct of the former not specifically intended to effect any such result. Statutes of limitation accomplish just that, but these have been invariably sustained when prescribing reasonable periods of limitation.⁶⁹ It has also been held that a statute, which provided that personal property acquired by either spouse as his or her separate property under the laws of the state of the matrimonial domicile at the time of acquisition should become community property upon their acquiring a domicile in the state enacting the statute, did not deprive either of his or her property without due process of law,⁷⁰ but this seems an extreme doctrine.⁷¹ The due process provisions do, however, prohibit both state and federal governments

v. Commonwealth, 152 Va. 1041, 148 S.E. 774; *Dunn v. State*, 36 Ohio App. 170, 173 N.E. 22. Statutes absolutely prohibiting the assignment of future wages and salaries have been held not to deny due process; *International Text-Book Co. v. Weissinger*, 160 Ind. 349, 65 N.E. 521, 65 L.R.A. 599, 98 Am.St.Rep. 334; *Heller v. Lutz*, 254 Mo. 704, 164 S.W. 123, L.R.A.1915B, 191.

⁶⁷ *Mutual Loan Co. v. Martell*, 222 U.S. 225, 32 S.Ct. 74, 56 L.Ed. 175, Ann.Cas.1913B, 529.

⁶⁸ *Otis v. Parker*, 187 U.S. 606, 23 S.Ct. 168, 47 L.Ed. 323; *Booth v.*

Illinois, 184 U.S. 425, 22 S.Ct. 425, 46 L.Ed. 623.

⁶⁹ *Turner v. New York*, 168 U.S. 90, 18 S.Ct. 38, 42 L.Ed. 392; *Soper v. Lawrence Bros. Co.*, 201 U.S. 359, 26 S.Ct. 473, 50 L.Ed. 788; *Montoya v. Gonzales*, 232 U.S. 375, 34 S.Ct. 413, 58 L.Ed. 645; *O'Neil v. Northern Colorado Irr. Co.*, 242 U.S. 20, 37 S.Ct. 7, 61 L.Ed. 123.

⁷⁰ *In re Thornton's Estate*, 1 Cal. 2d 1, 33 P.2d 1, 92 A.L.R. 1343.

⁷¹ See remarks of Mr. Chief Justice Taney in *Dred Scott v. Sandford*, 19 How. 393, 450, 15 L.Ed. 691.

from exercising this power in an unreasonable manner. A statute penalizing the failure of a chattel mortgagee, with a power of sale, to give the mortgagor notice of the sale by cancellation of the secured loan has, accordingly, been held to effect so arbitrary a transfer of the mortgagee's property to the mortgagor as to violate due process.⁷² Like holdings have been made in the case of statutes that authorized the modification of judgments that had already become final,⁷³ or that sought the revival of causes of action for the recovery of property after the running of the statute of limitations by removing the bar thereof.⁷⁴ The general principle that due process prohibits legislation that effects an uncompensated transfer of one person's property to another private person prevails unless it conflicts with an important social interest.

The protection of due process clauses has been invoked more often in connection with legislative regulation of the use of property than in connection with any other form of governmental control of property. The general effect of such regulation is to reduce to some extent what would otherwise have been lawful methods of using or enjoying property, and in some cases its effect may be the actual destruction of previously existing rights of property. It has been aptly stated that "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," that "some values are enjoyed under an implied limitation and must yield to the police power," but that "the implied limitation must have its limits if the due process and contract clauses are to be given any effect."⁷⁵ An important factor in defining those limits is the extent of the diminution resulting from a given regulation; another is the importance of the public interest to be promoted thereby. There are circumstances under which it is unreasonable, and therefore invalid, to promote even very important public interests by casting the burden of their cost upon the limited group whose property rights and values would be diminished by a given regulation, and under which due process requires that their cost should be spread over the com-

⁷² *Stierle v. Rohmeyer*, 218 Wis. 149, 280 N.W. 647.

⁷³ *Casieri's Appeal*, 286 Mass. 50, 190 N.E. 118.

⁷⁴ *Stewart v. Keyes*, 295 U.S. 403, 55 S.Ct. 807, 79 L.Ed. 1507; cf. *Camp-*

bell v. Holt, 115 U.S. 620, 6 S.Ct. 209, 29 L.Ed. 483, contra, which involved an action on a contract.

⁷⁵ Mr. Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322, 28 A.L.R. 1321.

munity at large by providing specific compensation for the property rights and values affected by such regulation.⁷⁶ It has, accordingly, been held that mine owners were being deprived of their property without due process of law by a statute prohibiting the mining of coal in such a way as to cause the subsidence of buildings used for human habitation, when the statute was applied to protect a person who had acquired the land on which his home was situated from the mining company under a deed in which the latter had reserved the right to mine the coal thereunder free from liability to him for any damages resulting therefrom.⁷⁷ The power of regulation is subject to other important restrictions. The probable effect of regulating some property in a given manner will be to confer benefits upon, and enhance the value of, other property. This fact alone does not establish a violation of due process. It has even been held that the state may, where a choice is unavoidable, validly choose to protect property of greater value to its social and economic life at the cost of the destruction of that of lesser social and economic significance.⁷⁸ The opinion in the case last cited expressly noted that the maintenance of the rules of property law existing prior to the enactment of the statute sustained in that case equally involved a choice that would have benefited one class of property at the expense of another. The almost inevitable existence of the relationships involving such results would render the police power impotent if due process were construed to freeze the status quo regardless of considerations of sound social policy. A preponderant public interest in the preservation of the one private interest over the other justifies the sacrifice of the latter, but this principle cannot be pressed to its logical extreme since that would involve reducing the due process provisions to impotence. Its true significance is that the mere fact that a given regulation involves the consequences indicated by it does not invalidate the regulation.⁷⁹ This can be done only by showing that there exist

⁷⁶ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 398, 43 S.Ct. 158, 67 L.Ed. 322, 28 A.L.R. 1321; *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 55 S.Ct. 854, 79 L.Ed. 1593, 97 A.L.R. 1106.

⁷⁷ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322, 28 A.L.R. 1321.

⁷⁸ *Miller v. Schoene*, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568.

⁷⁹ See *L'Hote v. New Orleans*, 177 U.S. 587, 20 S.Ct. 788, 44 L.Ed. 899, sustaining an ordinance segregating houses of prostitution against contention of an owner of property situated within the segregated district. The Court recognized that police regulations of this character cannot avoid inflicting pecuniary injury upon some, regardless of the limits selected.

no countervailing considerations of public advantage making it reasonable to impose upon the regulated class of property sacrifices of the magnitude involved in the given regulation. If these are absent the regulation will be held to violate due process as the taking of one man's property for the benefit of another private person.⁸⁰ The issue of the constitutionality of given regulations thus depends to a large extent upon the facts that are relevant to a determination of their reasonableness as applied to particular cases.

The general principles stated in the preceding paragraph have had a wide variety of application. The validity of regulations having a reasonable tendency to promote the public health or safety have been sustained whenever the restriction has not been excessive in the light of the importance of the public interest served thereby. The use of premises for the conduct of noxious, offensive or dangerous trades may be not only regulated but even prohibited.⁸¹ The public safety may be validly promoted by regulating the height of buildings within reasonable limits,⁸² by prescribing the character of the materials and methods of construction, and by defining the extent of the adjoining areas which must be left open to guard against the dangers of collapse or fire and to prevent the evils of overcrowding.⁸³ Property is not taken without due process even by requiring the demolition and removal of a wooden building erected within a given area within a city in violation of a city ordinance.⁸⁴ The safety of mine employees may be validly promoted by requiring mine owners to leave pillars of coal standing along the line of adjoining properties.⁸⁵ The regulation of the use of property for billboard advertising, and a limited prohibition of its use therefor, have been sustained as reasonable means for promoting safety on the state's public highways and other public interests.⁸⁶ The validity of

⁸⁰ *Thompson v. Consolidated Gas Utility Corporation*, 300 U.S. 55, 57 S.Ct. 364, 81 L.Ed. 510.

⁸¹ *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348, Ann.Cas.1917B, 927; *Reinman v. Little Rock*, 237 U.S. 171, 35 S.Ct. 511, 59 L.Ed. 900.

⁸² *Welch v. Swasey*, 214 U.S. 91, 29 S.Ct. 567, 53 L.Ed. 923.

⁸³ *Village of Euclid, Ohio, v. Ambler Realty Co.*, 272 U.S. 365, 47 S.

Ct. 114, 71 L.Ed. 303, 54 A.L.R. 1016.

⁸⁴ *Maguire v. Reardon*, 255 U.S. 271, 41 S.Ct. 255, 65 L.Ed. 625.

⁸⁵ *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531, 34 S.Ct. 359, 58 L.Ed. 713.

⁸⁶ *General Outdoor Advertising Co. v. Department of Public Works*, 239 Mass. 149, 193 N.E. 799; *Thomas Cusack Co. v. Chicago*, 242 U.S. 526, 37 S.Ct. 190, 61 L.Ed. 472, L.R.A.

regulating or prohibiting the erection of billboards primarily for aesthetic reasons is generally denied.⁸⁷ This is in accord with the still prevailing view that aesthetic considerations in themselves bear no such relation to the general welfare as to sustain limiting an owner's right to use his property, although their presence as incidental factors does not render a regulation invalid. This principle has generally prevailed even in passing on the validity of provisions of zoning ordinances.⁸⁸ The cases thus far cited all involved legislation curtailing the uses of property irrespective of the person of the user. There is another class of cases involving legislation that in terms excluded certain classes of persons from the right to use property in designated areas for purposes for which other classes were free to use it. Its aim was the promotion of public peace by insuring a measurable degree of racial segregation by forbidding white or colored persons from moving into and occupying a house in any block upon which the majority of the houses were occupied by persons of the other race. This has been held a denial of due process to the owner of such property as imposing an unreasonable restriction on his right to dispose of it.⁸⁹ There is nothing invalid in giving effect to a restrictive covenant in a deed prohibiting the sale or lease of real property to negroes since the due process clauses are

1918A, 136, Ann.Cas.1917C, 594; *Perlmutter v. Greene*, 259 N.Y. 327, 182 N.E. 5; *General Outdoor Advertising Co. v. City of Indianapolis*, Department of Public Parks, 202 Ind. 85, 172 N.E. 309, 72 A.L.R. 453. For case collecting authorities see *Cream City Bill Posting Co. v. City of Milwaukee*, 158 Wis. 86, 147 N.W. 25. An ordinance prohibiting construction of billboards except on realty owned or leased by occupants, and then only to advertise the sale of the realty or of merchandise kept for sale thereon, has been held to violate due process provisions of federal and state constitutions; *Mid-State Advertising Corporation v. Bond*, 274 N.Y. 82, 8 N.E.2d 286.

⁸⁷ *Bryan v. Chester*, 212 Pa. 259, 61 A. 894, 108 Am.St.Rep. 870; *City of Chicago v. Gunning System*, 214 Ill. 628, 73 N.E. 1035, 70 L.R.A. 230,

2 Ann.Cas. 892; *People ex rel. Wineburgh Advertising Co. v. Murphy*, 195 N.Y. 126, 88 N.E. 17, 21 L.R.A., N.S., 735.

⁸⁸ *City of Youngstown v. Kahn Bros. Bldg. Co.*, 112 Ohio St. 654, 148 N.E. 842, 43 A.L.R. 662; *MacRae v. City of Fayetteville*, 198 N.C. 51, 150 S.E. 810; *City of St. Louis v. Evraiff*, 301 Mo. 231, 256 S.W. 489; see, also, *Ware v. City of Wichita*, 113 Kan. 153, 214 P. 99, where the court seemed inclined to consider aesthetic ends as themselves legitimate police power ends, but finally sustained a prohibition against the construction of a store building in a residential zone because of its relation to the public health, safety and general welfare.

⁸⁹ *Buchanan v. Warley*, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149, L.R.A. 1918C, 210, Ann.Cas.1918A, 1201.

limits upon governmental acts, not upon private conduct.⁹⁰ However, an ordinance that confirmed a segregation agreement entered into between representatives of the white and black races, and that penalized its violation, has been held to violate the due process clause of the Fourteenth Amendment, in part upon the basis of the decision in *Buchanan v. Warley*.⁹¹

Rent Legislation

The limits imposed by due process requirements upon the power of government to fix prices for commodities and services has already been discussed. The principles there considered have been followed in defining its power to prescribe maximum rents. The existence of an acute housing emergency has been held a sufficient justification to warrant the fixing of maximum rents by public boards, and to validate a provision conferring upon tenants whose leases had expired the right to continue in the possession of the leased premises upon the payment of reasonable rent as fixed by such boards.⁹² However, it deprives landlords of their property without due process of law to enforce such legislation after the emergency justifying it has ceased, and it is a question of fact whether it has so ceased.⁹³

Zoning Ordinances

The development of the theory and practice of city planning resulted finally in the widespread adoption of zoning ordinances which divided cities into definite zones or regions and prescribed in detail the purposes for which property situated in the several zones could be used. The adoption and enforcement of such a system does not in itself conflict with the requirements of due process, and the discretion of the law-making body in defining the boundaries of the various zones will be held invalid only if clearly arbitrary.⁹⁴ The inclusion in a residential zone of vacant

⁹⁰ *Corrigan v. Buckley*, 271 U.S. 323, 46 S.Ct. 521, 70 L.Ed. 969; *United Cooperative Realty Co. v. Hawkins*, 269 Ky. 563, 108 S.W.2d 507.

⁹¹ *Liberty Annex Corporation v. City of Dallas*, Tex.Civ.App., 289 S.W. 1067; *City of Dallas v. Liberty Annex Corporation*, Tex.Com.App., 295 S.W. 591; *Id.*, Tex.Civ.App., 19 S.W.2d 845.

⁹² *Block v. Hirsch*, 256 U.S. 135, 41

S.Ct. 458, 65 L.Ed. 865, 16 A.L.R. 165; *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170, 41 S.Ct. 465, 65 L.Ed. 877.

⁹³ *Chastleton Corporation v. Sinclair*, 264 U.S. 543, 44 S.Ct. 405, 68 L.Ed. 841; *Peck v. Fink*, 55 App.D.C. 110, 2 F.2d 912.

⁹⁴ *Village of Euclid, Ohio, v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303, 54 A.L.R. 1016; *Zahn v. Board of Public Works of*

lands adjacent to an unrestricted use zone and having little value for residence purposes because of the character of the surrounding territory has, however, been held invalid where the facts showed that their inclusion in the residential zone was not justified by any considerations of the public health, safety, morals or welfare nor essential to the execution of the general zoning plan.⁹⁵ The application of particular provisions of zoning ordinances is invalid if in the specific cases involved they produce unreasonable and arbitrary results.⁹⁶ The bulk of the litigation concerning zoning ordinances has involved issues of that character. Industries, even those that are non-offensive and non-dangerous, may be excluded from residential zones, as may business establishments and apartment houses.⁹⁷ Prohibiting the enlargement of an existing place of business in a residential zone has been held both valid⁹⁸ and invalid.⁹⁹ It is invalid to prohibit the maintenance by one person of a gas plant in an industrial zone in which another is permitted to operate such a plant since this is held to be such an arbitrary and discriminatory impairment of property rights as to violate the provisions of the Fourteenth Amendment.¹ The cases are not in accord as to whether all but single-family residences may be excluded from a residential zone,² but the size of apartment buildings permitted in such zone may be limited.³ It has been several times decided that a provision whose effect is to limit the classes of persons who shall be

City of Los Angeles, 274 U.S. 325, 47 S.Ct. 594, 71 L.Ed. 1074.

⁹⁵ *Nectow v. Cambridge*, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842.

⁹⁶ *Women's Kansas City St. Andrew Soc. v. Kansas City*, 8 Cir., 58 F.2d 593; *Village of University Heights v. Cleveland Jewish Orphans' Home*, 6 Cir., 20 F.2d 743, 54 A.L.R. 1008.

⁹⁷ *Village of Euclid, Ohio, v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303, 54 A.L.R. 1016; *City of Aurora v. Burns*, 319 Ill. 84, 149 N.E. 784; *City of Providence v. Stephens*, 47 R.I. 387, 133 A. 614 (apartments); *contra*, *Smith v. City of Atlanta*, 161 Ga. 769, 132 S.E. 66, 54 A.L.R. 1001 (stores). Cf. *Nectow*

v. Cambridge, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842.

⁹⁸ *State ex rel. Carter v. Harper*, 182 Wis. 148, 196 N.W. 451, 33 A.L.R. 269.

⁹⁹ *City of St. Louis v. Evraiff*, 301 Mo. 231, 256 S.W. 489.

¹ *Dobbins v. Los Angeles*, 195 U.S. 223, 25 S.Ct. 18, 49 L.Ed. 169.

² Held valid—*Miller v. Board of Public Works of City of Los Angeles*, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479; *Zahn v. Board of Public Works of City of Los Angeles*, 195 Cal. 497, 234 P. 388; held invalid—*Nelson Bldg. Co. v. Binda*, 128 A. 618, 3 N.J.Misc. 420.

³ *Pritz v. Messer*, 112 Ohio St. 628, 149 N.E. 30.

permitted to use for residence purposes a house that meets the zoning requirements in other respects is so arbitrary as to violate due process or equal protection clauses or both so far as it prevents the use of such house for purposes not inherently objectionable,⁴ but it has been held in one case that college fraternities could be validly excluded from what was primarily a residence district.⁵ It is almost universally held that the exemption of existing structures and uses does not violate either the due process or equal protection clauses of the federal Constitution or comparable provisions of state constitutions.⁶ There is not the same unanimity on the validity of including existing structures and uses. Some decisions hold that the losses due to the compulsory removal of existing structures or the cessation of forbidden uses may not constitutionally be inflicted without compensation;⁷ others permit it without such compensation.⁸ It is valid to prohibit the rebuilding of non-conforming structures and impose reasonable limits on the extent to which they may be repaired,⁹ but invalid to prohibit the making of ordinary repairs thereon.¹⁰ Reasonable set-back provisions set by public authorities are valid,¹¹ but invalid when authorized to be established by action of the owners of other property on the same block.¹² The

⁴ *Women's Kansas City St. Andrew Soc. v. Kansas City*, 8 Cir., 58 F.2d 593 (old ladies' home); *Village of University Heights v. Cleveland Jewish Orphans' Home*, 6 Cir., 20 F.2d 743, 54 A.L.R. 1008 (orphans' home); *Jones v. City of Los Angeles*, 211 Cal. 304, 295 P. 14 (private hospital for mild mental cases); *Mayor & Council of Wilmington v. Turk*, 14 Del.Ch. 392, 129 A. 512 (private hospital for unobjectionable cases).

⁵ *Pettis v. Alpha Alpha Chapter of Phi Beta Pi*, 115 Neb. 525, 213 N.W. 835.

⁶ *City of Aurora v. Burns*, 319 Ill. 84, 149 N.E. 784; *City of Norton v. Hutson*, 142 Kan. 305, 46 P.2d 630; *Sampere v. City of New Orleans*, 166 La. 776, 117 So. 827.

⁷ *Jones v. City of Los Angeles*, 211 Cal. 304, 295 P. 14; *Western Theological Seminary v. City of Evanston*, 325 Ill. 511, 156 N.E. 778.

⁸ *State ex rel. Dema Realty Co. v. McDonald*, 168 La. 172, 121 So. 613; *Brett v. Building Com'r of Brookline*, 250 Mass. 73, 145 N.E. 269; *City of Tucson v. Arizona Mortuary*, 34 Ariz. 495, 272 P. 923.

⁹ *Haasa v. City of Memphis*, 149 Tenn. 235, 259 S.W. 545; *Zalk & Josephs Realty Co. v. Stuyvesant Ins. Co.*, 191 Minn. 60, 253 N.W. 8; *State v. Shannonhouse*, 166 N.C. 241, 80 S.E. 881; *contra*, *State ex rel. Modern Lumber & Millwork Co. v. MacDuff*, 161 Wash. 600, 297 P. 733.

¹⁰ *Provident Institution for Savings v. Castles*, 168 A. 169, 11 N.J. Misc. 773.

¹¹ *Gorieb v. Fox*, 274 U.S. 603, 47 S.Ct. 675, 71 L.Ed. 1228, 53 A.L.R. 1210.

¹² *Appeal of White*, 287 Pa. 259, 134 A. 409, 53 A.L.R. 1215.

validity of changes in the boundaries of zones that have once been established are determined by the same principles used in determining the validity of an original establishment of a zoning system.¹³

The character of the constitutional problems raised by zoning ordinances and their application to specific cases has led to including therein provisions for granting exemptions from their requirements. The grant to public officials of the power to make such exceptions does not violate the equal protection clause of the Fourteenth Amendment.¹⁴ The exercise of the discretion vested in such officials is subject to the usual constitutional requirements prohibiting its exercise in an arbitrary and discriminatory manner. The constitutional measure of the validity of the provisions of a zoning ordinance under the facts and circumstances of a specific case is not changed by the fact that its ultimate enforcement comes only after public officials have passed upon the facts of that case. Their refusal to make an exception or to grant the permission required by the ordinance is invalid if arbitrary, and it would be arbitrary in any situation in which the direct enforcement of the provisions of the ordinance would be such.¹⁵ It is, however, quite generally held that a zoning ordinance violates due process insofar as it requires the consent of the owners of adjacent property before a given property may be used for a purpose that the ordinance does not itself proscribe.¹⁶ The reason generally assigned in support of this position is that it confers upon private persons the power to determine the extent and character of use that another can make of his property while fixing no standard in accordance with which that power is to be exercised. It seems, however, that it is not invalid to make such consent a prerequisite to relief from restrictions that the ordinance itself has imposed upon the uses of property since the only power then possessed by private persons is to increase

¹³ *Cooper Lumber Co. v. Dammers*, 125 A. 325, 2 N.J.Misc. 289; *State v. Hillman*, 110 Conn. 92, 147 A. 294.

¹⁴ *Gorieb v. Fox*, 274 U.S. 603, 47 S.Ct. 675, 71 L.Ed. 1228, 53 A.L.R. 1210.

¹⁵ *Sundlun v. Zoning Board of Review of City of Pawtucket*, 50 R.I. 108, 145 A. 451; *Oklahoma City, Okl., v. Dolese*, 10 Cir., 48 F.2d 734.

¹⁶ *WASHINGTON EX REL. SEATTLE TITLE TRUST CO. v. ROBERGE*, 278 U.S. 116, 49 S.Ct. 50, 73 L.Ed. 210, 86 A.L.R. 654, *Black's Cas. Constitutional Law*, 2d, 461; *Spies v. Board of Appeals*, 337 Ill. 507, 169 N.E. 220; *Eubank v. Richmond*, 226 U.S. 137, 33 S.Ct. 76, 57 L.Ed. 156, 42 L.R.A.,N.S., 1123, *Ann. Cas.*1914B, 192.

the permissible uses of another's property.¹⁷ If the provision for such consent is such that the ultimate decision as to the use of the given property under the ordinance remains vested in an official body, there is no violation of due process.¹⁸ It is for the future to determine how far the principles that have been developed for measuring the constitutional validity of municipal zoning ordinances permit legislative zoning on a state wide basis for purposes of effectuating particular systems of economic planning so far as these transcend the conservation of a state's natural resources.

Conservation of Natural Resources

A state has an interest in the preservation and conservation of its natural resources which it may protect by regulating the methods of their exploitation and the manner and extent of their use. It may, accordingly, prohibit their use for purposes involving a great amount of waste in order to conserve them for less wasteful uses. It has been held to violate neither the due process nor equal protection clauses to prohibit the use of natural gas for the production of carbon black unless the potential heat of the gas were fully utilized for domestic or manufacturing purposes.¹⁹ A statute prohibiting the use of fish fit for human consumption for the manufacture of commercial fertilizer does not deprive the owners of reduction plants of their property without due process of law, nor does it deny them the equal protection of the laws to permit fish canners to use their excess fish to produce such fertilizers therefrom since that was justified as a reasonable difference in treatment between the owners of reduction plants and the owners of fish canneries due to the difference in their respective positions with respect to the state's fish resources.²⁰ It has also been decided that the preservation of an important industry utilizing a state's natural resources may, where a choice is inevitable, be effected by ordering the uncompensated destruction of another resource useable only for less important purposes. Thus the apple orchards owned by one group may be saved by

¹⁷ Cusack Co. v. Chicago, 242 U.S. 526, 37 S.Ct. 190, 61 L.Ed. 472, L.R. A.1918A, 136, Ann.Cas.1917C, 594; State ex rel. Standard Oil Co. v. Combs, 129 Ohio St. 251, 194 N.E. 875.

¹⁸ City of Stockton v. Frisbie & Latta, 93 Cal.App. 277, 270 P. 270.

¹⁹ Walls v. Midland Carbon Co., 254 U.S. 300, 41 S.Ct. 118, 65 L.Ed. 276.

²⁰ People v. Monterey Fish Products Co., 195 Cal. 548, 234 P. 398, 38 A.L.R. 1186.

the uncompensated destruction of cedars owned by another group where their destruction was the only practicable method of controlling a disease that threatened apple growing which constituted one of the state's important industries.²¹ The power of the state to so regulate oil and gas well operations as to prevent waste of either or both of those natural resources is unquestionable.²² It is not invalid to penalize the waste of natural gas by permitting it to escape into the air even though at the time there existed no market for the permissible uses of such gas, but it was intimated that the statute would deprive the owners of oil and gas wells of their property without due process of law if it should result in practically denying them the right even to use the gas for any purpose whatever because there never would be a market for the permissible uses.²³ The conservation of such natural resources as oil and gas and subterranean waters has been attempted in large part through legislation regulating the correlative rights of surface owners with respect to a common source of supply of such resources. The wasteful exploitation of the common source by any such surface owner may be validly prohibited in order to prevent an injury to the rights of other surface owners in the common source of such natural resources.²⁴ This in itself constitutes a sufficient social interest to warrant the government in interposing to prevent unfair methods of operation, although in fact the regulation of the methods of developing such resources has a close relation to the prevention of their wasteful use. The exigencies of an economic depression led government to intervene to regulate not merely the methods of operation but also the extent thereof by systems of pro-ration aimed at adjusting the supply of oil and gas to marketing facilities and reasonable market demands. Their real ultimate purpose seems to have been to raise prices by controlling the supply. Such statutes, and pro-ration orders based thereon, have been held valid so far as they could be justified as means for the prevention of the phy-

²¹ *Miller v. Schoene*, 276 U.S. 272, 45 S.Ct. 246, 72 L.Ed. 568.

²² *Bandinin Petroleum Co. v. Superior Court*, Los Angeles County, Cal., 284 U.S. 8, 52 S.Ct. 103, 76 L. Ed. 136, 78 A.L.R. 826; *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286 U.S. 210, 52 S.Ct. 559, 76 L.Ed. 1062, 86 A.L.R. 403.

²³ *F. C. Henderson, Inc. v. Rail-*

road Commission of Texas, D.C., 56 F.2d 218.

²⁴ *Ohio Oil Co. v. Indiana*, 177 U.S. 190, 20 S.Ct. 576, 44 L.Ed. 729; *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S.Ct. 337, 55 L. Ed. 369, Ann.Cas.1912C, 180; *Bandini Petroleum Co. v. Superior Court*, Los Angeles County, Cal., 284 U.S. 8, 52 S.Ct. 103, 76 L.Ed. 136, 78 A.L.R. 826.

sical waste due to inability to properly store the surplus production without waste,²⁵ and there can be no doubt as to their validity so far as they can be shown to be reasonably adapted to the protection of the correlative rights of surface owners in a common oil pool.²⁶ It has not yet been authoritatively determined whether they are valid if they can be justified only as a means to prevent the so-called economic waste incident to the sale of the oil or gas at low prices.²⁷ The enforcement of a system of proration to compel those, who may legally produce because they have outlets for permitted uses, to purchase gas from potential producers who are prohibited from producing because they lack such a market for their potential product, amounts to the taking of the property of the former and giving it to the latter, and deprives the former of their property without due process of law.²⁸ The theory that the proper functioning of our economic society requires an expansion of governmental control and planning of economic activities includes proposals that it regulate the use of privately owned natural resources so as to prevent not only their physical waste but also their so-called economic waste. The solution of some of the constitutional issues under our existing constitutional system, to which the enactment of concrete plans to effectuate this theory will give rise, are to be found in the principles on which courts have proceeded in deciding the cases considered in this paragraph. The fact that most of those decisions sustained the legislation involved in them results in a situation in which the limits of the constitutionally permissible in this field cannot be defined with any high degree of certainty.

Compulsory Transfers of Property, and Forced Expenditures

The general rule is that government may not appropriate private property even for public purposes without paying just compensation therefor.²⁹ There are, however, circumstances under which it may be taken without compensation by an exercise of government's regulatory powers. It has been held that an own-

²⁵ *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286 U.S. 210, 52 S.Ct. 559, 76 L.Ed. 1062, 86 A.L.R. 403.

²⁶ *Thompson v. Consolidated Gas Utilities Corporation*, 300 U.S. 55, 57 S.Ct. 364, 81 L.Ed. 510.

²⁷ See *Champlin Refining Co. v. Corporation Commission of Okla-*

homa, 286 U.S. 210, 52 S.Ct. 559, 76 L.Ed. 1062, 86 A.L.R. 403.

²⁸ *Thompson v. Consolidated Gas Utilities Corporation*, 300 U.S. 55, 57 S.Ct. 364, 81 L.Ed. 510.

²⁹ *Los Angeles v. Los Angeles Gas & Electric Corporation*, 251 U.S. 32, 40 S.Ct. 76, 64 L.Ed. 121.

er's interest in garbage is so slight that the state may appropriate it, or compel its delivery to an authorized agent of, or contractor with, the state without compensating the owner therefor. The promotion of the public health justifies the inconsequential taking involved in such measures.³⁰ The due process provisions of our constitutions interpose no constitutional barrier to the abatement of public nuisances although they do set limits to what may be declared such.³¹ The same principles that justify the abatement of such nuisances validate the uncompensated destruction of diseased plants and animals and of foods found unfit for human consumption.³² The exigencies of an efficient enforcement of the law have been held to justify the summary seizure and destruction of nets and other equipment capable of use in the violation of a state's game laws,³³ and the interest of even an innocent person may be validly forfeited if the property is used in violating the law by one intrusted by him with the possession of the property. This principle has been applied frequently to sustain forfeitures of vehicles and other property used in aid of violations of statutes prohibiting the manufacture and sale of intoxicating liquors³⁴ and of the federal revenue acts.³⁵ It has been stated in justification of such decisions that there are certain uses of property so undesirable that an owner surrenders its control to others at his peril.³⁶ There is another method of regulation frequently held not to deprive a person of property without due process of law which in fact deprives the owner of an important element affecting his control over his property. This is the class of regulations which impose on private persons the duty

³⁰ *Cornelius v. City of Seattle*, 123 Wash. 550, 213 P. 17; *State ex rel. Moock v. City of Cincinnati*, 120 Ohio St. 500, 166 N.E. 583; *Gardner v. State of Michigan*, 199 U.S. 325, 26 S.Ct. 106, 50 L.Ed. 212.

³¹ *Oklahoma City, Okl., v. Dolese*, 10 Cir., 48 F.2d 734; *Miller v. Horton*, 152 Mass. 540, 26 N.E. 100, 10 L.R.A. 116, 23 Am.St.Rep. 850.

³² *Miller v. Horton*, 152 Mass. 540, 26 N.E. 100, 10 L.R.A. 116, 23 Am.St.Rep. 850; *North American Cold Storage Co. v. Chicago*, 211 U.S. 306, 29 S.Ct. 101, 53 L.Ed. 195, 15 Ann. Cas. 276; *Stanislaus County Dairy-men's Protective Ass'n v. Stanislaus County*, 8 Cal.2d 378, 65 P.2d 1305.

³³ *Lawton v. Steele*, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385.

³⁴ *Van Oster v. Kansas*, 272 U.S. 465, 47 S.Ct. 133, 71 L.Ed. 354, 47 A.L.R. 1044.

³⁵ *Goldsmith, Jr.-Grant Co. v. United States*, 252 U.S. 505, 41 S.Ct. 189, 65 L.Ed. 376; *United States v. One Saxon Automobile*, 4 Cir., 257 F. 251; *United States v. One Buick Roadster Automobile*, D.C., 244 F. 961.

³⁶ *Van Oster v. Kansas*, 272 U.S. 465, 47 S.Ct. 133, 71 L.Ed. 354, 47 A.L.R. 1044.

of making certain forced expenditures of their funds. It does not deprive the seller of gasoline of property without due process to compel him to bear the costs of collecting a tax on its sale, and the same holds true with respect to expenses incurred by any person when compelled to act as the government's tax collector.³⁷ It is no valid objection to an anti-smoke ordinance that compliance will require an expenditure of funds that would not otherwise have been made.³⁸ The cost of relocating the mains of a local utility made necessary by the construction of municipal improvements may validly be imposed upon the utility,³⁹ and the entire cost of removing and rebuilding a railroad bridge and culvert made necessary by a deepening of the channel of a stream by the public may be put on the railroad.⁴⁰ The entire cost of abolishing grade crossings may also be imposed on railroads if public safety reasonably requires it, regardless of the financial condition of the railroad and even though the roads were built after the railroad had been constructed.⁴¹ It has, however, been definitely affirmed that the due process clause of the Fourteenth Amendment does impose some limits on the state's power to impose financial burdens upon railroads in requiring the elimination of grade crossings, but it was held that a railroad's constitutional rights were not being violated by being forced to follow a plan of separation set by public authority which was more expensive than an alternative plan which the railroad contended would be equally effective.⁴² An indication of a probable limit is found in

³⁷ *Pierce Oil Corporation v. Hopkins*, 264 U.S. 137, 44 S.Ct. 251, 68 L.Ed. 593.

³⁸ *Northwestern Laundry v. Des Moines*, 239 U.S. 486, 36 S.Ct. 206, 60 L.Ed. 396. In *Leonard v. Earle*, 279 U.S. 392, 49 S.Ct. 372, 73 L.Ed. 754, it was held to involve no deprivation of their property without due process of law to subject oyster packers to a regulation which compelled them to utilize part of their premises to store empty shells. But it violates due process to compel one person to make expenditures for the exclusive benefit of another private person, as by requiring one land owner to support the land and buildings on an adjacent owner's land by suitable propping devices when excavations

are made on the former's land, *Young v. Mall Inv. Co.*, 172 Minn. 428, 215 N.W. 840, 55 A.L.R. 461.

³⁹ *New Orleans Gas Light Co. v. Drainage Commission of New Orleans*, 197 U.S. 453, 25 S.Ct. 471, 49 L.Ed. 831.

⁴⁰ *Chicago, B. & Q. R. Co. v. Illinois*, 200 U.S. 561, 26 S.Ct. 341, 50 L.Ed. 596, 4 Ann.Cas. 1175.

⁴¹ *Erie R. Co. v. Board of Public Utility Commissioners*, 254 U.S. 394, 41 S.Ct. 169, 65 L.Ed. 322.

⁴² *Lehigh Valley R. Co. v. Board of Public Utility Com'rs of New Jersey*, 278 U.S. 24, 49 S.Ct. 69, 73 L.Ed. 161, 62 A.L.R. 805.

a case in which the lower court was reversed for refusing to consider facts bearing on the issue whether the public interest in highway safety had been subordinated in the particular case to the provision of a system of transportation in competition with the railroads.⁴³ It does, however, take a railroad's property without due process of law to impose on a railroad the cost of removing the soil incident to the deepening of the channel of a stream over which the railroad carried its bridge, since the removal of that soil had no connection with the removal of obstructions due to the acts of the railroad.⁴⁴ The principles implicit in all these decisions is that those responsible for a condition inimical to the public health, safety or welfare may be compelled to bear the cost of removing that condition, but that they may not be singled out to bear an expense to remove a condition for which they are not in any way responsible or which cannot be justified as promotive of the public health, safety or welfare. The enforcement of uncompensated obedience to a legitimate police power regulation is not a taking of property in violation of due process, but the imposition upon a group, specially singled out, of forced expenditures violates due process if it is not a legitimate exercise of the state's police power or the regulatory powers of the federal government.⁴⁵

⁴³ *Nashville, C. & St. L. R. Co. v. Walters*, 294 U.S. 405, 55 S.Ct. 486, 79 L.Ed. 949.

⁴⁴ *Chicago, B. & Q. R. Co. v. Illinois*, 200 U.S. 561, 26 S.Ct. 341, 50 L.Ed. 596, 4 Ann.Cas. 1175.

⁴⁵ Compulsory expenditures in connection with the collection of taxes can also be justified as exercises of the taxing powers of the state or federal governments. The concluding sentence must be read in the light of that consideration. Other forms of regulation involving compulsory expenditures that have been sustained as consonant with due process are those requiring common carriers by motor vehicle using the

public streets to file bonds conditioned on paying liabilities incurred in the operation of such vehicles, *Packard v. Banton*, 264 U.S. 140, 44 S.Ct. 257, 68 L.Ed. 596; those providing for compulsory insurance for operators of motor vehicles on the public highways to protect those injured by their operation thereon, *In re Opinion of the Justices*, 81 N.H. 566, 129 A. 117, 39 A.L.R. 1023; *In re Opinion of the Justices*, 251 Mass. 569, 147 N.E. 681, 691; *Brest v. Commissioner of Insurance*, 270 Mass. 7, 169 N.E. 657; and numerous statutes imposing on public utilities the duty of expanding their plant in order to provide their patrons with adequate service.

REGULATION OF CONTRACT RELATIONS

247. A state may establish reasonable regulations governing the formation of contracts within it, the terms that may be included therein, the provisions that must be included therein or excluded therefrom, and the performance of contracts so far as performable within it. The due process clause of the Fourteenth Amendment prohibits it from enacting or enforcing unreasonable regulations concerning these matters.
248. A state is prevented by said due process clause from impairing or destroying the right of its own residents and the residents of other states to enter into contracts outside it that are not operative within its jurisdiction, and from impairing, destroying or enlarging rights and obligations arising under such contracts.
249. A state may exercise its police power to promote the prompt adjustment of claims, whether arising out of breaches of contract or based on violations of non-contractual obligations, by imposing reasonable penalties for the failure or refusal to do so.
250. It may, in connection with any of the above matters, make reasonable classifications.

Control Over Contracts Made Within the State

The liberty and property that are protected against unreasonable state regulation by the due process and equal protection clauses of the Fourteenth Amendment include freedom of contract.⁴⁶ It is not an absolute right, and a state may validly limit, and under some circumstances entirely prohibit, its exercise. The general test for determining the validity of such restrictions is their reasonableness. The application of that principle to a variety of specific problems has already been considered in the sections of this chapter dealing with the regulation of business and of the employer-employee relation.⁴⁷ The subsequent discussion will be limited to certain special problems of a different character. A state has the undoubted power to regulate the making of contracts within it. This includes the power of determining the acts and conditions on whose occurrence or existence contractual relations shall arise. It has, for example, been held not to deprive a hail insurance company of

⁴⁶ *Allgeyer v. Louisiana*, 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832.

⁴⁷ See Sections 241 to 243.

its property without due process to provide that it should be bound, and the insurance take effect, from and after twenty-four hours from the day and hour the application therefor was taken within the state by an authorized agent of the company, and not to deny it the equal protection of the laws to limit the statute to hail insurance companies.⁴⁸ This power may not, however, be so exercised as to force a contract upon a person as a consequence of conduct not reasonably related to such result.⁴⁹ In the case last cited the statute had no such effect since the company retained the liberty of not accepting applications whose acceptance was an essential step in the process of making such insurance contracts. It is equally valid to prescribe reasonable regulations governing the period during which one of the parties shall have a right to rescind. A statute giving those purchasers of farm machinery who bought for their own use a reasonable period for inspecting and testing for determining its fitness for the uses for which it was purchased, and giving the buyer the right to rescind within such period, has been held not to violate any rights guaranteed the vendor by the due process and equal protection clauses of the Fourteenth Amendment.⁵⁰ It was sustained not as a measure to lessen the dangers of fraud but rather as one intended to reduce losses due to the purchaser's lack of capacity to determine the suitability of the machinery without testing it. A state may validly insure that the policy intended to be promoted by a reasonable regulation of freedom of contract will in fact be realized by voiding all con-

⁴⁸ *National Union Fire Ins. Co. v. Wanberg*, 260 U.S. 71, 43 S.Ct. 32, 67 L.Ed. 136.

⁴⁹ For a discussion sustaining the power of a state to compel insurance companies acting within it to insure owners of motor vehicles using the public highways against loss due to their operation thereof on said highways by a provision constituting an integral part of a system of compulsory automobile accident insurance, see *In re Opinion of the Justices*, 251 Mass. 569, 147 N.E. 681, 691.

⁵⁰ *Advance-Rumely Thresher Co. v. Jackson*, 287 U.S. 283, 53 S.Ct. 133, 77 L.Ed. 306, 87 A.L.R. 205. A state may also limit the defenses available

to parties to a contract in actions thereon; thus due process is not denied an insurance company by depriving it of defenses based on false and fraudulent misstatements in the application for insurance unless the matter misrepresented in the judgment of the jury, actually contributed to the death of the insured, *Northwestern Nat. Life Ins. Co. v. Riggs*, 203 U.S. 243, 27 S.Ct. 126, 51 L.Ed. 168, 7 Ann.Cas. 1104; nor by excluding the insured's suicide as a defense unless the suicide was contemplated at the time the policy was taken out, *Whitfield v. Aetna Life Ins. Co. of Hartford*, 205 U.S. 489, 27 S.Ct. 578, 51 L.Ed. 895.

tract terms inconsistent therewith.⁵¹ Liberty of contract may be limited not only by prohibiting the inclusion of certain terms in contracts but as well by requiring that they include certain provisions. It has been held no denial of due process for a state to require insurance companies to include in policies written within it an arbitration clause making the decision of arbitrators on the extent of loss final.⁵² The same principles would apply to any other contracts and any other terms. The ultimate issue is the reasonableness of the particular restriction. The equal protection clause requires only that the state make no unreasonable classifications in legislation of this character. They are sustained unless facts are presented establishing their unreasonableness.⁵³

Control Over Contracts Made Without the State

The cases considered in the preceding paragraph were concerned with a state's power to regulate contracts made within it. It has a much more limited control over contracts entered into outside it and over the relations thereby created. It is prevented by the due process clause from prohibiting the modification of a contract made within it by a subsequent one made outside it, and may not refuse recognition to the latter in defining the respective rights of the parties thereto and to the original agreement as modified thereby.⁵⁴ The same constitutional pro-

⁵¹ National Union Fire Ins. Co. v. Wanberg, 260 U.S. 71, 43 S.Ct. 32, 67 L.Ed. 136; Advance-Rumely Thresher Co. v. Jackson, 287 U.S. 283, 53 S.Ct. 133, 77 L.Ed. 306, 87 A.L.R. 285.

⁵² Hardware Dealers' Mut. Fire Ins. Co. v. Glidden Co., 284 U.S. 151, 52 S.Ct. 69, 76 L.Ed. 214.

⁵³ National Union Fire Ins. Co. v. Wanberg, 260 U.S. 71, 43 S.Ct. 32, 67 L.Ed. 136; Advance-Rumely Thresher Co. v. Jackson, 287 U.S. 283, 53 S.Ct. 133, 77 L.Ed. 306, 87 A.L.R. 285; Hardware Dealers' Mut. Fire Ins. Co. v. Glidden Co., 284 U.S. 151, 52 S.Ct. 69, 76 L.Ed. 214; Metropolitan Casualty Ins. Co. v. Brownell, 294 U.S. 580, 55 S.Ct. 538, 70 L.Ed. 1070.

⁵⁴ New York Life Ins. Co. v. Dodge, 246 U.S. 357, 38 S.Ct. 337, 62 L.Ed. 772, Ann.Cas.1918E, 593, holding that State A could not validly refuse to measure the respective rights and obligations of an insurance company and an insured under a loan agreement executed in State B by the law of State B merely because the insurance policy was itself a contract that had been made in State A under whose law the net value of the policy on the failure to pay the premium when due could be applied only against premium loans whereas under the loan agreement made in State B such value could be applied against all loans. That the law of State A could validly apply, and would apply, if the loan contract had been made in State A, see Mu-

vision has also been held to prohibit a state from enlarging the obligations of a contract made without it where its own interest has but a slight connection with the substance of the contract. It may, accordingly, not apply its law invalidating contractual provisions limiting the time within which actions must be instituted on insurance contracts to contracts made in another state even where the insured is a resident and the acts giving rise to the insurer's liability occurred within it.⁵⁵ Any attempt on its part to do so and to seize the insurer's property in payment of an obligation that has ceased to exist by the law of its creation deprives the insurer of his property without due process of law.⁵⁶ Neither may it apply to such foreign contracts the provisions of its statute penalizing the failure of an insurer to pay the amount due on the maturity of the policy within the time prescribed by the statute, even though the insured was its resident at that time.⁵⁷ It is, however, invariably asserted that due process does not prevent a state from regulating, or even prohibiting, by reasonable legislation, the performance within it of a contract made outside it,⁵⁸ but this apparently does not permit it to expand the scope of the obligation to perform.⁵⁹ It was intimated in one case that there might be situations in which the state of the forum might have a sufficient interest to justify applying its local policy to a foreign contract when its enforcement is sought in its courts, but no indication was given as to the probable scope of this doctrine.⁶⁰ It is apparent from the decisions considered herein that the mere facts that one of the parties to the contract is a resident, or that the contract may require payments to be made within it, or that it may relate to factors present or occurring within it, do not in general constitute such an interest. The principle generally applied in cases of the character considered in this paragraph is that, though a state may

tual Life Ins. Co. v. Liebing, 259 U.S. 209, 42 S.Ct. 467, 66 L.Ed. 900, which also indicates factors relevant in determining the place of contracting.

⁵⁵ Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U.S. 143, 54 S.Ct. 634, 78 L.Ed. 1178, 92 A.L.R. 928.

⁵⁶ Home Ins. Co. v. Dick, 281 U.S. 397, 50 S.Ct. 338, 74 L.Ed. 926, 74 A.L.R. 701.

⁵⁷ Aetna Life Ins. Co. v. Dunken, 266 U.S. 389, 45 S.Ct. 129, 69 L.Ed. 342.

⁵⁸ Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U.S. 143, 54 S.Ct. 634, 78 L.Ed. 1178, 92 A.L.R. 928.

⁵⁹ Same case as in footnote 58.

⁶⁰ Same case as in footnote 58.

prohibit the making of certain contracts within it, it is prevented by the due process clause of the Fourteenth Amendment not only from impairing or destroying the rights of its own residents and the residents of other states to enter into contracts outside it that are not operative within its jurisdiction, but also from impairing or destroying the rights and obligations arising under such contracts. In contrast with the situation in these cases is that in which the state in which a contract is made seeks to control the incidents of the relations established thereby even while it is being performed outside the state. The fact that such a contract is to be performed outside the state does not of itself place its terms, obligations and sanctions beyond reach of that state. The power of a state to effect legal consequences is not limited to occurrences within it if it has control over the status that gives rise to those consequences, although due process prohibits the exercise of that power in an unreasonable or arbitrary manner. This problem has arisen most frequently in connection with attempts by a state to make its own workmen's compensation law applicable to injuries occurring outside it if the contract of employment was entered into within it. It has been held that a statute so providing did not deprive the employer of his property without due process since the state had a legitimate interest to protect even where the employe was a non-resident alien.⁶¹ It has, however, also been held that the state in which the injury occurred in such a situation might validly apply its workmen's compensation act.⁶² The prevention of a double recovery for the same injury can in most cases be avoided by invoking the protection of the full faith and credit clause.⁶³

A state may prohibit foreign corporations from engaging therein in a local business, or impose constitutionally valid conditions on their admission for that purpose. It may validly make its policy in that matter effective through prohibiting foreign corporations that have not been admitted to transact local business therein, and those who would contract with such corporations therein in local transactions, from entering into such contracts within the state.⁶⁴ States have frequently sought

⁶¹ *Alaska Packers' Ass'n v. Industrial Accident Commission of California*, 294 U.S. 532, 55 S.Ct. 518, 79 L.Ed. 1044.

⁶² *United States Casualty Co. v. Hoage*, 64 App.D.C. 284, 77 F.2d 542.

⁶³ U.S.C.A.Const. Art. 4, Sec. 1. The bearing of that clause on this problem and on that of the recognition of foreign contracts and rights is discussed in Chap. 5, Section 100.

⁶⁴ *Hooper v. California*, 155 U.S. 648, 15 S.Ct. 207, 39 L.Ed. 297;

to make that policy effective, especially in the case of foreign insurance companies, by limiting the rights of their own residents to insure property situated within them by contracts entered into outside their jurisdiction. They may validly prohibit such unauthorized insurance companies from soliciting applications within the state, and refuse local enforcement to insurance contracts made outside the state in response to such applications.⁶⁵ The obligation generally imposed on a state by the due process clause of recognizing rights arising under a foreign contract does not include that of protecting contracts resulting from acts in violation of its own laws. A state may not, however, prohibit its residents from entering without the state into contracts with such unauthorized companies if the contract is not to be performed within it, and a contract of insurance covering property within a state is not because of that deemed one to be performed within it. It has thus been held that due process is violated by penalizing a resident for entering into an insurance contract outside the state covering property within it,⁶⁶ or by penalizing his act of sending from within the state a letter required under such a foreign insurance contract to make the insurance applicable to property within the state.⁶⁷ This principle has been extended to prevent such state from imposing a tax on the premiums paid with respect to such insurance.⁶⁸ Neither may a state validly prohibit a foreign insurance company authorized to transact business within it from paying a fee to non-resident agents for writing without the state policies covering risks within it, nor revoke its license for violation of such prohibition.⁶⁹ It has no constitutional power to control the payment made outside its borders, and its attempt to do so denies the company due process. It is, however, valid to require such company to employ resident agents only in writing such policies within the state.⁷⁰ The whole purport of these decisions

Nutting v. Massachusetts, 183 U.S. 553, 22 S.Ct. 238, 46 L.Ed. 324.

⁶⁵ Bothwell v. Buckbee-Mears Co., 275 U.S. 274, 48 S.Ct. 124, 72 L.Ed. 277.

⁶⁶ St. Louis Cotton Compress Co. v. Arkansas, 260 U.S. 346, 43 S.Ct. 125, 67 L.Ed. 297.

⁶⁷ Allgeyer v. Louisiana, 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832.

⁶⁸ Compania General De Tabacos de Filipinas v. Collector of Internal Revenue, 275 U.S. 87, 48 S.Ct. 100, 72 L.Ed. 177.

⁶⁹ Fidelity & Deposit Co. of Maryland v. Tafoya, 270 U.S. 426, 46 S.Ct. 331, 70 L.Ed. 664.

⁷⁰ Palmetto Fire Ins. Co. v. Conn, 272 U.S. 295, 47 S.Ct. 88, 71 L.Ed. 243.

is to prevent a state from enforcing a constitutionally valid policy in its dealings with foreign corporations by means curtailing or destroying the rights of its own residents and of those of other states to enter into contracts outside it that are not operative within its jurisdiction.

Penalties for Failure to Adjust Claims

A state has a legitimate interest in promoting the observance of their agreements by the parties to a contract, and a like interest in promoting the prompt adjustment of claims whether based wholly on contract, in part thereon, or on the violation of a duty imposed by law apart from contract. It may, therefore, employ its police power to protect its interest in these matters. A common form of statute enacted for that purpose is that imposing interest, penalties or other forms of cost upon those unreasonably refusing to perform their contractual or other duties or unreasonably delaying their performance thereof. Statutes of this character have sometimes been assailed as depriving those upon whom such added burdens are imposed of their property without due process of law, but they have been almost universally sustained against such objections.⁷¹ It is only when their application produces clearly arbitrary results, such as penalizing a person for a refusal to pay promptly a claim later shown to have been excessive, that they are held to deny due process.⁷² It is immaterial in determining the validity of such pecuniary burdens that they are denominated as penalties if their amount is moderate, since it is their measure and not their

⁷¹ *Life & Casualty Ins. Co. of Tennessee v. McCray*, 291 U.S. 566, 54 S. Ct. 482, 78 L.Ed. 987 (penalizing wrongful refusal to pay face of an insurance policy held valid even as applied to a case in which such refusal was in good faith and based on reasonable grounds); *Yazoo & M. V. R. Co. v. Jackson Vinegar Co.*, 226 U.S. 217, 33 S.Ct. 40, 57 L.Ed. 193 (imposing penalty on railroad for prompt payment of a claim for damages for injury to freight held valid as applied to case in which recovery equalled amount of claim made); *Kansas City Southern R. Co. v. Anderson*, 233 U.S. 325, 34 S.Ct. 599, 56

L.Ed. 983 (accord, where claim was based on statute imposing liability for damage to live stock killed by trains).

⁷² *St. Louis, I. M. & S. R. Co. v. Wynne*, 224 U.S. 354, 32 S.Ct. 493, 56 L.Ed. 799, 42 L.R.A., N.S., 102 (where amount finally recovered was less than that claimed but equal to amount sued for); *Chicago, M. & St. P. R. Co. v. Polt*, 232 U.S. 165, 34 S.Ct. 301, 58 L.Ed. 554 (where amount finally recovered was less than amount originally claimed but in excess of amount tendered by defendant railway).

name which is controlling.⁷³ The Supreme Court has rejected the contention that such exactions, if reasonable in amount, clog the access to the courts of those from whom they are demanded, and has held them to be reasonable compensation for the loss or inconvenience likely to be suffered by creditors.⁷⁴ The principal point of attack on such legislation has been based on the claim that limiting their scope to particular classes of claims or obligations denied the group singled out the equal protection of the laws. It has, however, been held not violative of the equal protection clause to limit their application to the obligations of insurers to pay promptly claims arising under policies issued by them.⁷⁵ Statutes permitting the recovery of attorney's fees in actions against common carriers by railroad based on their failure to properly perform their public duties as such have been held not to deny them equal protection merely because limited to railroads,⁷⁶ and the same holding has been made in the case of such statutes intended to enforce the prompt payment by railroads of claims arising in favor of persons other than shippers or passengers out of their negligent operation of their roads.⁷⁷ It has, however, been held a denial of equal protection to single out incorporated railroads and subject them to the payment of attorney's fees for their failure to pay promptly small claims not necessarily connected with their special duties as common carriers nor with special obligations that could be validly imposed upon them.⁷⁸ It was deemed unreasonable to

⁷³ *Life & Casualty Ins. Co. of Tennessee v. McCray*, 291 U.S. 566, 54 S.Ct. 482, 78 L.Ed. 987.

⁷⁴ *Life & Casualty Ins. Co. of Tennessee v. McCray*, 291 U.S. 566, 54 S.Ct. 482, 78 L.Ed. 987.

⁷⁵ *Life & Casualty Ins. Co. of Tennessee v. McCray*, 291 U.S. 566, 54 S.Ct. 482, 78 L.Ed. 987; *Fidelity Mut. Life Ass'n v. Mettler*, 185 U.S. 308, 22 S.Ct. 662, 46 L.Ed. 922.

⁷⁶ *Seaboard Air Line Ry. v. Seegers*, 207 U.S. 73, 28 S.Ct. 28, 52 L.Ed. 108; *Atchison, T. & S. F. Ry. Co. v. Vosburg*, 238 U.S. 56, 35 S.Ct. 675, 59 L.Ed. 1199, L.R.A.1915E, 953; *Chicago & N. W. R. Co. v. Nye-Schneider Fowler Co.*, 260 U.S. 35, 43 S.Ct. 55, 67 L.Ed. 117 (but so far

as it allowed imposing attorney's fee on appeal where on appeal the judgment was reduced, although not below defendant's original tender, it was held so unreasonable as to violate due process).

⁷⁷ *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U.S. 96, 19 S.Ct. 609, 43 L.Ed. 909 (where claim was for damages resulting from negligent escape of fire).

⁷⁸ *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U.S. 150, 17 S.Ct. 255, 41 L.Ed. 666. See, however, *Missouri, K. & T. R. Co. of Texas v. Cade*, 233 U.S. 642, 34 S.Ct. 678, 58 L.Ed. 1135, and *Missouri, K. & T. R. Co. of Texas v. Harris*, 234 U.S. 412, 34 S.Ct. 790, 58 L.Ed. 1377, L.R.A.1915E, 942.

limit the imposition of such burdens to that one class of debtors. The cases in which the classifications have been sustained have defined the class upon which the burdens were imposed in terms of the character of the claim rather than in terms of the person of the debtor. They indicate that such statutes may validly be limited to the group against which claims of the prescribed character are most likely to arise, or to a group shown by experience to be that in which the evils aimed at by such statutes are especially prevalent. The latter of these factors is the more fundamental. A state is not limited to inflicting pecuniary penalties and costs in exerting pressure to induce the prompt adjustment of claims. It may avail itself of any reasonable pressure device. It has thus been held not to violate due process to provide that claims for loss or damage to freight must be paid or rejected within a stated reasonable period, and that failure to do so shall constitute an admission that the claim is due and payable.⁷⁹

DUE PROCESS AND COMMON LAW RIGHTS

251. The due process clauses have not deprived government of the power to modify or abolish rights existing under the common law where such action constitutes a reasonable exercise of its police or other regulatory power.

The conception of liability without fault was not unknown to the common law. It has an important application in the rules under which a master was responsible for the torts of his servant committed within the scope of his employment. It was, however, recognized as the exception rather than the rule. The due process clause of the Fourteenth Amendment did not deprive the states of the power of legislating to extend the field in which liability could be imposed without fault.⁸⁰ A state may validly make mine owners civilly liable for defaults of inspectors who, though selected by them and liable to discharge by them, were required to be selected from a panel of inspectors holding state licenses.⁸¹ The expense of providing medical care for alien sea-

⁷⁹ *Southern R. Co. v. Clift*, 260 U.S. 816, 43 S.Ct. 126, 67 L.Ed. 283.

⁸⁰ *Chicago v. Sturges*, 222 U.S. 313, 82 S.Ct. 92, 56 L.Ed. 215, Ann.Cas. 1913B, 1349.

⁸¹ *Wilmington Star Mining Co. v.*

Fulton, 205 U.S. 60, 27 S.Ct. 412, 51 L.Ed. 708. This case involves a mere extension of the ordinary common law rule of the master's responsibility for the wrongs of his employee.

men found to be diseased upon their arrival in the United States may be imposed upon the owner or master of the vessel on which they arrive even though he be without fault. That does not violate the due process clause of the Fifth Amendment.⁸² A state may impose upon its municipalities absolute liability for damage to property resulting from mob violence since this is a reasonable means for increasing municipal efficiency in protecting property.⁸³ It has been held valid to impose on one railroad liability for damages to freight caused by connecting carriers,⁸⁴ and to impose on the owner of motor vehicles liability for injuries resulting from their negligent operation by one using them with the owner's consent.⁸⁵ The decisions are predicated on the assumption that the person upon whom such vicarious liability is imposed is subrogated to the rights of the injured party against the actual wrongdoer, but this does not eliminate the risk that the ultimate incidence of the burden may rest on him. It is, however, a violation of due process to impose such liability if the wrongdoer is using the car without the owner's consent.⁸⁶ The usual bank deposit guaranty acts, and those workmen's compensation acts that establish funds under state control by assessments on classes of employers, may result in making one person liable for the defaults of another, but these have been sustained against objections based on the due process clause.⁸⁷ It has even been held that due process is not violated by forfeiting an innocent person's property used in aid of the violation of the criminal law by another who had it in his possession with

⁸² *United States v. New York & Cuba Mail S. S. Co.*, 269 U.S. 304, 40 S.Ct. 114, 70 L.Ed. 281.

⁸³ *Chicago v. Sturges*, 222 U.S. 313, 32 S.Ct. 92, 56 L.Ed. 215, Ann.Cas. 1913B, 1340.

⁸⁴ *Atlantic Coast Line R. Co. v. Glenn*, 239 U.S. 388, 36 S.Ct. 154, 60 L.Ed. 344; *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U.S. 186, 31 S.Ct. 164, 55 L.Ed. 167, 31 L.R.A., N.S., 7.

⁸⁵ *Hodge Drive-It-Yourself Co. v. Cincinnati*, 284 U.S. 335, 52 S.Ct. 144, 76 L.Ed. 323; *Stapleton v. Independent Brewing Co.*, 198 Mich. 170, 164 N.W. 520, L.R.A.1918A, 916.

A state may apply such statute even where the consent was given outside it if the consent is broad enough to include use within it; *Young v. Masci*, 289 U.S. 253, 53 S.Ct. 599, 77 L.Ed. 1158.

⁸⁶ *Daugherty v. Thomas*, 174 Mich. 371, 140 N.W. 615, 45 L.R.A., N.S., 699, Ann.Cas.1915A, 1163.

⁸⁷ *NOBLE STATE BANK v. HASKELL*, 219 U.S. 104, 31 S.Ct. 186, 55 L.Ed. 112, 32 L.R.A., N.S., 1062, Ann. Cas.1912A, 487, Black's Cas. Constitutional Law, 2d, 410; *Mountain Timber Co. v. Washington*, 243 U.S. 219, 37 S.Ct. 260, 61 L.Ed. 685, Ann.Cas. 1917D, 642.

the former's consent.⁸⁸ A corporation and its stockholders are not deprived of their property without due process by making the corporation criminally liable for the acts of its officers acting within the scope of their employment.⁸⁹ The imposition of liability without fault is valid whenever that is a reasonable means for promoting a legitimate governmental policy, and invalid only when no such justification exists therefor.

The common law system of rights and remedies as it existed at the time of the adoption of the Fourteenth Amendment to the federal Constitution did not thereby acquire a perpetual guarantee against change by legislative processes. The states still possess the power to abolish a right of action where the common law gave one. It has thus been held not violative of due process to abolish the right to recover damages for the alienation of the affections of a wife or for criminal conversation with her,⁹⁰ and that of recovering damages for breach of a promise to marry.⁹¹ The necessary effect of statutes of this character is to deny legal protection to certain individual interests formerly enjoying such protection.⁹² The due process clause does not require a state to give legal protection to every conceivable individual interest, nor that an interest once protected shall continue to enjoy it perpetually. It is, however, true that a judgment as to the reasonableness of a regulation of conduct cannot wholly ignore the effect of the regulation upon the previously existing system of legally protected interests, and that the legislative power to withdraw such protection is not unlimited.⁹³ The extant decisions give no very definite indication of that limit. The same is true of the legislature's undoubted power to alter the common law system of rights by the modification or abolition of defenses.⁹⁴

⁸⁸ *Van Oster v. Kansas*, 272 U.S. 465, 47 S.Ct. 133, 71 L.Ed. 354, 47 A.L.R. 1044; *Goldsmith-Grant Co. v. United States*, 254 U.S. 505, 41 S.Ct. 189, 65 L.Ed. 376.

⁸⁹ *New York Cent. & H. R. R. Co. v. United States*, 212 U.S. 481, 29 S.Ct. 304, 53 L.Ed. 613.

⁹⁰ *Hanfgarn v. Mark*, 274 N.Y. 22, 8 N.E.2d 47.

⁹¹ *Fearon v. Treanor*, 272 N.Y. 268, 5 N.E.2d 815, 109 A.L.R. 1229.

⁹² This is true in any case in which the interest cannot be protected in equity.

⁹³ See, for example, *Truax v. Corrigan*, 257 U.S. 312, 42 S.Ct. 124, 66 L.Ed. 254, 27 A.L.R. 375.

⁹⁴ *Missouri Pac. Ry. Co. v. Mackey*, 127 U.S. 205, 8 S.Ct. 1161, 32 L.Ed. 107; *Missouri Pac. R. Co. v. Castle*, 224 U.S. 541, 32 S.Ct. 606, 56 L.Ed. 875.

CIVIL RETROSPECTIVE LEGISLATION

252. The due process clause of the Fourteenth Amendment limits a state in giving retrospective operation to its legislation, but does not prevent it from so doing when considerations of manifest justice make such legislation reasonable. The due process clause of the Fifth Amendment operates in the same manner with respect to the powers of Congress.
253. The constitutions of the several states contain general provisions, and in some instances, express specific provisions, prohibiting civil retroactive legislation.

The contract clause⁹⁵ was the only federal constitutional provision limiting states in enacting and enforcing civil retrospective legislation prior to the ratification of the Fourteenth Amendment. The constitutions of the individual states then afforded, and still afford, a measurable degree of protection against such legislation.⁹⁶ Legislation of this character can of course affect subsequent conduct only; it is impotent to change the past. The essence of its retroactivity consists in that it modifies vested legal relations that resulted from past events under the law existing at the time of their occurrence and substitutes other legal relations therefor. It involves something more than a change in the manner in which existing legal rights may be exercised in the future, although even such legislation does involve important changes in the scope and content of existing legal relations whose existence, however, is left intact. The practically necessary consequences of civil retrospective legislation are to divest one person of a completely vested legally protected advantage with respect to another person and to confer upon that other a countervailing advantage that can be legally asserted or defended against the former. Legislation that merely prevents the ripening of inchoate rights into completely vested rights does not deprive the owner of the former of prop-

⁹⁵ U.S.C.A.Const. Art. 1, Sec. 10.

⁹⁶ *Clark v. Clark*, 10 N.H. 380, 34 Am.Dec. 165 (retroactive application of a statute making an act a ground for divorce which, when done, was not such, violates constitutional provision prohibiting retrospective acts for decision of civil causes); *Shonk v. Brown*, 61 Pa. 320 (curative act

validating a deed invalid for want of power when made is unconstitutional as impairing vested interests). The constitutions of some states, including Colorado, Montana, New Hampshire, and Texas, expressly prohibit retroactive legislation. Many others expressly prohibit it in limited fields.

erty without due process of law.⁹⁷ The repeal of a statute conferring the power of eminent domain upon a public utility does not deprive it of property without due process of law even though it involves the dismissal of condemnation proceedings already instituted but not yet finally terminated.⁹⁸ The repeal of a statute under which rights of property have become vested cannot destroy those rights, since to give that effect to the repealing statute would deprive the owners of those rights of property without due process of law.⁹⁹ The effect of the running of the statute of limitations upon the existence of legal rights depends upon the character of those rights, but all such statutes create an immunity in favor of the debtor against the successful prosecution of his claim by the creditor. The repeal of such statute after a claim had been barred would deprive debtors of their property if the statute were construed to permit suits on claims barred at the time of the repeal. An alteration of the period so as to permit suits on claims already barred would have the same effect. It has, however, been held that due process is not violated thereby so far as claims based on contract are concerned,¹ but the contrary has also been held.² A statute that enacts a period of limitation on a right unlimited at its inception is valid if it leaves a reasonable period after its enactment for the assertion of existing claims.³ The same principles govern the validity of retrospective changes in the period during which proceedings must be commenced for the judicial review of awards made by workmen's compensation boards.⁴ Cases of this character are sometimes justified on the theory that such statutes affect merely the remedy, but a change in remedy involving the divesting of the vested rights of one person in favor of another might rea-

⁹⁷ *McNeer v. McNeer*, 142 Ill. 388, 32 N.E. 681, 19 L.R.A. 256.

⁹⁸ *Western Union Tel. Co. v. Louisville & N. R. Co.*, 258 U.S. 13, 42 S.Ct. 258, 66 L.Ed. 437.

⁹⁹ *Ettor v. Tacoma*, 228 U.S. 148, 33 S.Ct. 428, 57 L.Ed. 773; *Choate v. Trapp*, 224 U.S. 665, 32 S.Ct. 565, 56 L.Ed. 941.

¹ *Campbell v. Holt*, 115 U.S. 620, 6 S.Ct. 209, 29 L.Ed. 483.

² *Board of Education of Normal School Dist. v. Blodgett*, 155 Ill. 441, 40 N.E. 1025, 31 L.R.A. 70, 46 Am.

St.Rep. 348; *Eingartner v. Illinois Steel Co.*, 103 Wis. 373, 79 N.W. 433, 74 Am.St.Rep. 871.

³ *Mattson v. Department of Labor and Industries of State of Washington*, 293 U.S. 151, 55 S.Ct. 14, 79 L.Ed. 251.

⁴ *Smolen v. Industrial Commission*, 324 Ill. 32, 154 N.E. 441 (valid where period allowed under prior law had not yet run); *Arnold & Murdock Co. v. Industrial Commission*, 314 Ill. 251, 145 N.E. 342, 40 A.L.R. 1470 (invalid where such period had run at time of enactment of the statute).

sonably be held to be governed by the same principles as direct attempts to accomplish that result.

Curative acts comprise an important type of civil retrospective legislation. Their purpose is usually either the validation of transactions tainted with invalidity for failure to comply with the formal requirements of their validity, or to confer rights that have been lost through failure to meet the conditions to their assertion. It is the general rule that invalidity based on want of power or jurisdiction cannot be cured by subsequent legislation.⁵ It is also true that due process and similar constitutional provisions prohibit legislation retroactively curing formal defects under many circumstances. The general test that is applied in determining the constitutionality of curative legislation is whether considerations of manifest justice warrant the consequential impairment of the vested rights or immunities of one person on behalf of the beneficiary thereof.⁶ The validation of illegal acts of public officials in collecting tolls so as to defeat the right of the person paying them to recover the sums paid has been held to deprive the latter of his property without due process of law because of its manifest injustice.⁷ The same principles are applied in determining the validity of curative acts permitting rights once lost to be asserted.⁸ It has thus been held valid to restore a right of action that had been lost under circumstances involving no blame whatever on the part of the plaintiff, and that depriving the defendant of what had been a complete and valid defense at the time of the enactment of the curative act did not deprive him of property without due process

⁵ *Shonk v. Brown*, 61 Pa. 320.

⁶ Held valid: *Inhabitants of Town of Goshen v. Inhabitants of Town of Stonington*, 4 Conn. 209, 10 Am.Dec. 121; *Lane v. Nelson*, 79 Pa. 407; *McFaddin v. Evans-Snyder-Buel Co.*, 185 U.S. 505, 22 S.Ct. 758, 46 L.Ed. 1012. Held invalid: *Steger v. Traveling Men's Building & Loan Ass'n*, 208 Ill. 236, 70 N.E. 236, 100 Am.St. Rep. 225.

⁷ *Forbes Pioneer Boat Line v. Board of Comm'rs of Everglades Drainage Dist.*, 258 U.S. 338, 42 S.Ct. 325, 66 L.Ed. 647. The validation of import duties and taxes illegally imposed is generally sustained on the

score that they might have been validly imposed in the first instance and that they may be validly imposed for past benefits; *United States v. Heinszen & Co.*, 206 U.S. 370, 27 S.Ct. 742, 51 L.Ed. 1098, 11 Ann.Cas. 638. Curative acts having the effect of validity penalties illegally collected or imposed are generally held invalid, *Kent v. Gray*, 53 N.H. 576.

⁸ Held valid: *DANFORTH v. GROTON WATER CO.*, 178 Mass. 472, 59 N.E. 1033, 86 Am.St.Rep. 495, *Black's Cas. Constitutional Law*, 2d, 504; *Dunbar v. Boston & P. R. Corp.*, 181 Mass. 333, 63 N.E. 916. Held invalid: *Kent v. Gray*, 53 N.H. 576.

of law.⁹ The infraction of right was deemed more than balanced by strong considerations of manifest justice which justified the undeniable transfer of property from one person to another through resort to curative legislation.

REGULATORY LEGISLATION AND THE EQUAL PROTECTION OF THE LAWS

254. The states are permitted to make reasonable classifications in enacting and enforcing their regulatory legislation. The reasonableness of a classification can be determined only by considering its purpose, the policy to be promoted thereby, and the relation of the resulting differences in treatment to those factors.

The preceding portions of this chapter have dealt more with the limits imposed upon governmental regulation by the due process clauses than with those resulting from the equal protection clause of the Fourteenth Amendment. This was because the emphasis therein was on the kind of regulations that could be imposed rather than on the power of government to mark off the regulated field from that which it chose to leave free of the particular regulations involved in any given case. A state is not prevented by the equal protection clause from making reasonable classifications in exercising its regulatory powers. The necessary result of any classification made in connection with the exercise of a state's police power is to subject some persons to a form of regulation from which others are relieved, or to confer upon some an advantage denied others. The validity of a classification thus depends on whether the legislature had reasonable grounds for its restriction of the class upon which burdens are imposed or benefits conferred. The usual objections to a classification made in connection with a regulation that imposes a burden is that it is invalid to limit the burden to the defined class, and that, if a regulation of the given character is to be put into effect, it should be extended to others as well. The usual objection to such a classification in connection with a regulation that confers upon some persons benefits that are denied to others is that it is invalid to thus limit those benefits. The grant of benefits is frequently part of a larger plan of

⁹ Robinson v. Robins Dry Dock & Repair Co., 238 N.Y. 271, 144 N.E. 579, 36 A.L.R. 1310.

regulation in which the benefit conferred consists of immunity from the burden. The second objection is in such case merely a different form of stating the first. The crucial point in any case involving the validity of a classification is the existence of differences in treatment between groups. The issue is as to the reasonableness of those differences, and the basis on which the classes are defined is relevant only so far as it bears thereon. There is, accordingly, no basis of classification that is invariably sustained. There are, however, certain principles almost universally applied in this field. The equal protection clause is not violated merely because a state makes an exception which it is required to make by some other provision of the federal Constitution. This has been specifically held in a case involving an exercise of a state's taxing power for reasons that are equally applicable to its police power.¹⁰ It has also been held that an objection that legislation violated the clause because not including certain other persons would not be sustained in the absence of a showing that there actually were such others engaged in the business to which the legislation applied.¹¹ The fact that those excepted from a statute regulating carriers by motor vehicle were subject to comparable regulations by local authorities was held a sufficient basis for sustaining the reasonableness of the classification.¹² A classification justifiable by its tendency to promote a legitimate governmental policy is valid. This is the basis for sustaining the exception from a statute regulating motor vehicles using the public highways of such vehicles as are used by their owner in transporting his own live stock, and of busses employed in carrying children to and from school.¹³ No violation of the equal protection clause results from a classification whose effect is to relieve a municipally owned utility from regulation of its rates by a state board actually regulating the rates of a competing privately owned company,¹⁴ nor from one that accorded the marketing contracts

¹⁰ *Union Bank & Trust Co. v. Phelps*, 288 U.S. 181, 53 S.Ct. 321, 77 L.Ed. 687, 83 A.L.R. 1428.

¹¹ *Pullman Co. v. Knott*, 235 U.S. 23, 35 S.Ct. 2, 59 L.Ed. 105. This case involved a tax, but its principle is equally applicable to regulatory statutes.

¹² *Continental Baking Co. v. Woodring*, 286 U.S. 352, 52 S.Ct. 595, 76 L.Ed. 1155, 81 A.L.R. 1402.

¹³ *Continental Baking Co. v. Woodring*, 286 U.S. 352, 53 S.Ct. 595, 76 L.Ed. 1155, 81 A.L.R. 1402. See also *Sproles v. Binford*, 286 U.S. 374, 52 S.Ct. 581, 76 L.Ed. 1167, sustaining an exemption from such regulations although its effect and purpose were to aid railroads.

¹⁴ *Springfield Gas & Electric Co. v. Springfield*, 257 U.S. 66, 42 S.Ct. 24, 66 L.Ed. 131.

of co-operatives a degree of protection denied other contracts.¹⁵ The legislature may in adopting a policy recognize an existing situation and adapt its legislation thereto. It is on this basis that the exemption of existing structures from zoning ordinances has been held valid,¹⁶ and that the grant of a preferred position to prior applicants for certificates of convenience and necessity to operate motor vehicles over a given route has been sustained.¹⁷ The validity or invalidity of classifications cannot be determined without taking into account all the factors that have a natural and obvious relation to the purposes of the regulation in connection with which they are made and to the differences in treatment made in connection with realizing those purposes.

The possible bases of classification are almost unlimited. There are, however, a few that are of such frequent occurrence as to merit at least passing comment. Statutes are not uncommon that discriminate against resident aliens or against non-residents. It has been held a denial of equal protection to aliens residing within a state to subordinate their right to work in the ordinary occupations of workingmen to the state's policy of forcing employers to give a limited preference in employment to resident citizens.¹⁸ This principle has been applied to invalidate an ordinance forbidding the grant to aliens of a license to vend soft drinks.¹⁹ There are, however, certain businesses and occupations from which aliens may be validly excluded such as selling liquor or operating pool rooms.²⁰ They may be excluded from working for the public or for private contractors while engaged on public works.²¹ The right to own agricultural lands may validly be limited to citizens, and it is also valid in defining who may own such lands to discriminate against aliens ineligible for federal citizenship and in favor of those eligible

¹⁵ *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Marketing Ass'n*, 276 U.S. 71, 48 S.Ct. 291, 72 L.Ed. 473.

¹⁶ *City of Aurora v. Burns*, 319 Ill. 84, 149 N.E. 784; *City of Norton v. Hutson*, 142 Kan. 305, 46 P.2d 630.

¹⁷ *Bradley v. Public Utilities Commission of Ohio*, 289 U.S. 92, 53 S.Ct. 577, 77 L.Ed. 1053, 85 A.L.R. 1131.

¹⁸ *Truax v. Raich*, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131, L.R.A.1916D, 545, Ann.Cas.1917B, 283.

¹⁹ *George v. City of Portland*, 114 Or. 418, 235 P. 681, 39 A.L.R. 341; but see *Commonwealth v. Hana*, 195 Mass. 262, 81 N.E. 149, 11 L.R.A., N.S., 799, 122 Am.St.Rep. 251, 11 Ann. Cas. 514.

²⁰ *Ohio ex rel. Clarke v. Deckebach*, 274 U.S. 392, 47 S.Ct. 630, 71 L.Ed. 1115.

²¹ *Heim v. McCall*, 239 U.S. 175, 36 S.Ct. 78, 60 L.Ed. 203, Ann.Cas.1917B, 287.

therefor.²² This has been extended to sustain an act prohibiting the appointment of an alien as the guardian of the estate of his American-born child when any part of such estate consisted of such lands.²³ Aliens may be denied the right to hunt a state's wild game, and, as a method for making that prohibition effective, may be denied the right to own or possess guns and rifles.²⁴ It has even been held that an alien illegally within the United States might validly be denied access to a state's courts to recover wages earned by him.²⁵ This is a decision of more than doubtful validity.²⁶ The discrimination between residents and non-residents occurs most frequently in municipal ordinances which generally reveal a clear attempt to protect the economic interests of the local community against the competition of outsiders. It occurs in connection with a varied array of regulatory ordinances. The decisions on their validity under the equal protection clause are not uniform, but those supported by the better reasoned opinions generally deny their validity except where the discrimination is the incidental result of a regulatory measure which would be valid apart from that result.²⁷ The deci-

²² *Terrace v. Thompson*, 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255.

²³ *In re Fujimoto's Guardianship*, 130 Wash. 188, 226 P. 505, 39 A.L.R. 937; see contra, *In re Tetsubumi Yano's Estate*, 188 Cal. 645, 206 P. 995.

²⁴ *Patsone v. Pennsylvania*, 232 U.S. 138, 34 S.Ct. 281, 58 L.Ed. 539. See, also, *Alsos v. Kendall*, 111 Or. 359, 227 P. 286, sustaining a state law prohibiting the licensing of aliens to engage in the business of salmon fishing on the score that the state held title to such fish in trust for its citizens.

²⁵ *Coules v. Pharris*, 212 Wis. 558, 250 N.W. 404. The case did not involve state legislation but action by its courts. The court held such action not violative of the Fourteenth Amendment, U.S.C.A.Const. It did not indicate whether it had reference to the due process clause, the equal protection clause, or both.

²⁶ See *Janusis v. Long*, 284 Mass.

403, 188 N.E. 228, holding that an alien illegally within the United States was not on that account barred from suing in the state's courts for damages for personal injuries. The opinion does not discuss the constitutional aspects of the matter. It has been intimated that Congress might validly deny such aliens all civil rights and every protection under the provisions of the Fifth and Fourteenth Amendments, U.S.C.A. Const.; see *Martinez v. Fox Valley Bus Lines, D.C.*, 17 F.Supp. 576.

²⁷ Holding such discrimination violative of equal protection: *May Coal & Grain Co. v. Kansas City, D. C.*, 10 F.Supp. 792 (ordinance required all retail coal dealers to maintain yard and equipment within the city); *Williams v. McCartan, D.C.*, 212 F. 345 (ordinance required residence within city as condition to procuring a license to operate therein as a stationery engineer); *Whipple v. City of South Milwaukee*, 218 Wis. 395, 261 N.W. 235 (ordinance required license for peddlers selling

sions considered in this paragraph cover but an infinitesimal portion of those involving the application of the equal protection clause, but suffice to show at least the necessity of something more than a consideration of the formal bases on which a classification is made in testing its validity.

THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS

255. A state may not enforce regulations or impose burdens, which it is constitutionally prohibited from enforcing or imposing directly, by conditioning the grant of privileges which it is free to grant or withhold on compliance with or the acceptance of such regulations or burdens.

The powers of government include that of conferring privileges which it is free to grant or withhold. The argument is sometimes made in support of the validity of particular regulations that they can be justified as conditions imposed by a state upon the grant by it of some privilege or other to the regulated person. A statute requiring railroads to pay their employees semi-monthly has, for example, been held not to deny a domestic railroad corporation due process of law because the state could impose such condition upon its privilege to be or continue as a corporation since it might in the first instance have wholly denied it that privilege.²⁸ This legal theory for sustaining the constitutionality of state regulatory legislation and taxation has been invoked particularly in connection with a state's power to regulate or tax its own corporations or foreign corporations engaged within it in transacting a local business. The legal principle on which the latter applications were based was a state's constitutional power completely to exclude foreign corporations from transacting local business within it. The power wholly to exclude was deemed to include that of admitting them on such

or soliciting orders for non-resident merchants but not for those so acting for resident merchants). Discriminations against non-residents in imposing license fees are held to violate the equal protection clause in *Campbell Baking Co. v. Harrisonville, Mo.*, D.C., 19 F.2d 159, and *Ward Baking Co. v. Fernandina, Fla.*, D.C., 29 F.2d 789. A statute giving lien or protection in proceedings to forfeit

an automobile for use in the illegal transportation of intoxicants only if the automobile was owned by a resident was held to violate the equal protection clause, *C. I. T. Corporation v. Commonwealth*, 153 Va. 57, 149 S.E. 523.

²⁸ *New York Cent. & H. R. R. Co. v. Williams*, 199 N.Y. 108, 92 N.E. 404, 35 L.R.A., N.S., 549, 139 Am.St.Rep. 850.

terms and conditions as the state might think proper to impose.²⁹ The states exercised this power at an early date to condition the admission of foreign corporations to transact local business within them upon agreements by such corporations not to resort to the federal courts nor to remove thereto actions brought against them in the courts of the state imposing the condition. Revocation of the license to transact local business was the usual penalty imposed for breach of such agreements or of a similar obligation imposed by statute apart from agreement. It has now been definitely established that statutes imposing such conditions are unconstitutional attempts to deprive the federal courts of the jurisdiction conferred upon them by the judiciary Article of the federal Constitution and legislation enacted by Congress in pursuance thereof, and that the enforcement of such provisions by punishment or revocation of the license to transact local business deprives such foreign corporations of their constitutional right of access to the federal courts where Congress has conferred that right in pursuance of its constitutional powers.³⁰ Those decisions were not, however, based on the due process clause of the Fourteenth Amendment. The general principle on which they were decided has been applied to invalidate state statutes conditioning the right of foreign corporations to transact local business within a state on compliance with tax legislation that would have violated both the commerce and due process clauses of the federal Constitution had it been imposed in an unconditional form.³¹ It was held that the exaction of the tax as a condition to the continued exercise of the privilege was a violation of the commerce and due process clauses. The fact that the foreign corporations were engaged within the state in interstate as well as local commerce was later held to be immaterial so far as the due process phase was concerned.³² The principle is not limited to protecting foreign corporations from unconstitutional exactions and burdens. It has been extended to protect residents of a state against being deprived of the

²⁹ *Paul v. Virginia*, 8 Wall. 168, 19 L.Ed. 357.

257 U.S. 529, 42 S.Ct. 188, 66 L.Ed. 352, 21 A.L.R. 186.

³⁰ *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L.Ed. 365; *Doyle v. Continental Ins. Co.*, 94 U.S. 535, 24 L.Ed. 148; *Barron v. Burnside*, 121 U.S. 186, 7 S.Ct. 931, 30 L.Ed. 915; *Herndon v. Chicago, R. I. & P. R. Co.*, 218 U.S. 135, 30 S.Ct. 633, 54 L. Ed. 970; *Terral v. Burke Const. Co.*,

³¹ *Western Union Tel. Co. v. Kansas*, 216 U.S. 1, 30 S.Ct. 190, 54 L. Ed. 355.

³² *Terral v. Burke Const. Co.*, 257 U.S. 529, 42 S.Ct. 188, 66 L.Ed. 352, 21 A.L.R. 186.

privilege of using the state's highways in connection with their business as private carriers. Legislation attempting to convert a private carrier into a common carrier without his consent violates the due process clause of the Fourteenth Amendment,³³ and it was, accordingly, held that attempts to secure that consent by requiring it as a condition to a private carrier's privilege of using the state's highways in his business was equally a violation of that clause.³⁴ It may, therefore, be taken as established that a regulation that would violate a given provision of the federal Constitution if directly imposed will violate that same provision if sought to be imposed as a condition to the grant of a privilege which the state is free to grant or withhold. The doctrine of these cases is not that the imposition of such unconstitutional conditions violates the due process clause, but that it violates the same constitutional provision that would be violated if the conditional regulation were sought to be imposed directly and unconditionally. The imposition of an unconstitutional condition thus violates the due process clause only if the regulation would violate it were it imposed directly and not in such conditional form. The existence of this doctrine makes it unsafe to deduce the conformity of any regulation with the requirements of the due process and equal protection clauses from the fact that those subject to it enjoy privileges which the state might validly deny them or that the matter regulated is connected with such privileges.

³³ *Michigan Public Utilities Commission v. Duke*, 266 U.S. 570, 45 S. Ct. 191, 69 L.Ed. 445, 36 A.L.R. 1105.

³⁴ *Frost & Frost Trucking Co. v. Railroad Commission of California*, 271 U.S. 583, 46 S.Ct. 605, 71 L.Ed. 1101, 47 A.L.R. 457.

CHAPTER 16

THE CONTRACT CLAUSE

- 256-257. State Acts to which Contract Clause Applies.
- 258-260. What Contracts are Protected.
 - 261. The Obligation of the Contract.
- 262-263. Impairment of the Obligation.
- 264-265. Contracts between Private Persons.
- 266-269. Public Contracts.
 - 270. Public Grants.
- 271-272. Contractual Exemption from Taxation.
- 273-276. Corporate Charters.
- 277-278. Impairment of Contracts by Taxation.

STATE ACTS TO WHICH CONTRACT CLAUSE APPLIES

- 256. The federal Constitution provides, in Section 10 of Article 1 thereof, that no state shall pass any law impairing the obligation of contracts. The constitutions of many of the states impose the same restriction upon their legislatures.
- 257. The contract clause is a limit only on a state's legislative powers, but every enactment to which the state gives the force of law is deemed legislation for the purposes of that clause, including municipal ordinances, statutes, and state constitutional provisions. The decisions of a state's courts are not limited by the clause.

The inclusion in the federal Constitution of the clause prohibiting the states from passing any law impairing the obligation of contracts¹ was due largely to the fear that the then existing financial conditions would produce a widespread enactment of state laws for the repudiation of both public and private debts. It has, however, received some of its most important applications in fields other than that involving the debtor-creditor relation. A similar provision has never been incorporated in that Constitution as a limitation upon the powers of Congress, although the due process clause of the Fifth Amendment has accorded contracts a somewhat similar, but narrower, protection against federal legislation.² The contract clause differs from such pro-

¹ U.S.C.A.Const. Article 1, Section 10.

² *Perry v. United States*, 294 U.S. 830, 55 S.Ct. 432, 79 L.Ed. 912, 95

visions as the due process and equal protection clauses of the Fourteenth Amendment in that it limits only a state's legislative powers whereas the latter are limitations upon every governmental organ of a state regardless of what state governmental power it exercises. It has been stated that its prohibition "is aimed at the legislative power of the state, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals."³ This statement is inaccurate insofar as it defines the scope of the prohibition in terms of the particular governmental organ by whose acts rights under prior contracts are affected.

The test that determines whether a given act of a state's governmental organ or agency is limited by the contract clause is whether that particular act is legislative in character. It is immaterial that the given organ or agency may in some instances, or even in the majority of instances, act in a non-legislative capacity, as may well be the case where the state constitution permits a single organ or agency to exercise more than a single governmental function, and as is frequently the case with respect to such agencies of local government as municipal councils which usually exercise both legislative and purely administrative functions. The acts of such councils of a legislative character must conform to the requirements of the contract clause,⁴ while those of a purely administrative character can never violate that clause.⁵ The enforcement of the prohibitions of the contract clause thus requires some theory as to what acts of state governmental agencies are legislative, and what acts thereof are not legislative. Its prohibitions do not extend to all of the law-making processes that operate to produce the law prevailing in a state. That part of such law which is the product of the activity of a state's judicial department is not deemed legislation. It has, accordingly, been frequently decided that any changes in the obligations of a contract resulting from a change in judicial decisions affecting that matter occurring after the contract was entered into do not impair its obligations in the constitutional sense of

A.L.R. 1335; *Lynch v. United States*, 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434.

³NEW ORLEANS WATER-WORKS CO. v. LOUISIANA SUGAR REFINING CO., 125 U.S. 18, 8 S.Ct. 741, 31 L.Ed. 607, *Black's Cas. Constitutional Law*, 2d, 508.

⁴*City of Minneapolis v. Minneapolis St. Ry. Co.*, 215 U.S. 417, 30 S.Ct. 118, 54 L.Ed. 259.

⁵NEW ORLEANS WATER-WORKS CO. v. LOUISIANA SUGAR REFINING CO., 125 U.S. 18, 8 S.Ct. 741, 31 L.Ed. 607, *Black's Cas. Constitutional Law*, 2d, 508.

that concept.⁶ It is immaterial whether the subsequent decision effects a change in the state's common law or in the judicial construction of a statute in existence when the contract alleged to be impaired thereby was entered into.⁷ The law of the state may have been as effectively changed by such changes of decision as it would have been had a similar modification of the common law been made by statute or the original statute been amended to conform to its changed construction, but the resulting adjustments of relations arising from prior contracts are not prohibited by the contract clause. The judicial decisions embodying a state's common law and construing its constitution and statutes at any given time are, however, important in defining the obligation of contracts entered into at such time for the purpose of determining whether that has been impaired by subsequent legislation.⁸ The only law of a state against which the contract clause is directed is its enacted law. This includes any enactment to which the state gives the force of law regardless of the general character of the governmental agency in which the power to enact it is vested.⁹ It thus includes statutes whether enacted by the state's legislature or by the direct action of the people, municipal ordinances,¹⁰ and state constitutions.¹¹ Changes in the judicial construction of statutes are not deemed the legal equivalent of statutory changes, and a statute in force when a contract was entered into cannot be made into a subsequent statute through a new interpretation by the courts.¹² The same is true with respect to changes in the judicial construction of municipal ordinances and constitutions.¹³

⁶ *Rooker v. Fidelity Trust Co.*, 261 U.S. 114, 43 S.Ct. 288, 67 L.Ed. 556; *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 44 S.Ct. 197, 68 L.Ed. 382.

⁷ *Fleming v. Fleming*, 264 U.S. 29, 44 S.Ct. 246, 68 L.Ed. 547.

⁸ *Louisiana ex rel. Southern Bank v. Pilsbury*, 105 U.S. 278, 26 L.Ed. 1090; *Muhlker v. New York & H. R. Co.*, 197 U.S. 544, 25 S.Ct. 522, 49 L.Ed. 872.

⁹ *Williams v. Bruffy*, 96 U.S. 176, 24 L.Ed. 716 (holding invalid an enactment of the Confederate States sequestering claims owed by residents of those states to residents in states not part of the Confederacy

and discharging the debtors, to which one of those states subsequently gave the force of law).

¹⁰ *City of Minneapolis v. Minneapolis St. Ry. Co.*, 215 U.S. 417, 30 S.Ct. 118, 54 L.Ed. 259. See also *King Mfg. Co. v. Augusta*, 277 U.S. 100, 48 S.Ct. 489, 72 L.Ed. 801.

¹¹ *White v. Hart*, 13 Wall. 646, 20 L.Ed. 685; *New Orleans Gas-Light Co. v. Louisiana Light & Heat Producing & Mfg. Co.*, 115 U.S. 650, 6 S.Ct. 252, 29 L.Ed. 516.

¹² *Fleming v. Fleming*, 264 U.S. 29, 44 S.Ct. 246, 68 L.Ed. 547.

¹³ Compare cases in which the Supreme Court has refused to follow

The increasing complexity of modern social and economic life has led to a great expansion of administrative agencies upon which the legislature has conferred the power of defining the meaning of a legislatively prescribed standard in its application to the specific cases within its scope. The acts of such agencies in thus carrying out the legislative policy frequently involve the formulation by them of what amounts to a rule of law for such cases. Their acts are to that extent legislation and subject to the limitations found in the contract clause. The orders of a public service commission fixing the rates chargeable by a public utility furnish a common instance of such action, and these are as much legislative in character as would be a statute prescribing such rates. The order of such a commission which required a railroad to carry a public street under its tracks by means of a subway and to bear half of the cost thereof has been held legislative in character and invalid because it impaired a prior contract between the railroad and a city under which the latter was required to bear the entire cost of such construction.¹⁴ Such order amounted to prescribing a rule to govern the relations of the railroad and the city to which the state gave the force of law. Statutes frequently confer upon state boards or officials the power to make interpretative rules and regulations having the force of law so far as such boards or officials remain within their delegated powers. It appears never to have been questioned that such rules and regulations are legislation subject to the limitations of the contract clause. The purely administrative acts of state governmental agencies do not, however, constitute legislation for purposes of defining the scope of that clause.¹⁵ The legislative or administrative character of an act does not depend upon the agency performing it but upon wheth-

decisions of state courts holding bonds issued under authority of state statutes void because the statutes violated provisions of the state constitution after such courts had previously sustained such statutes and held such bonds to be valid obligations, the refusal of the Supreme Court having been induced by its desire to protect bonds acquired in reliance upon the earlier decisions of such state courts: *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L.Ed. 520; *Douglass v. Pike County*, 101 U.S. 677, 25 L.Ed. 968. That these de-

cisions are not based on the contract clause is definitely determined in *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 44 S.Ct. 197, 68 L.Ed. 382, which contains an excellent discussion thereof.

¹⁴ *Missouri, K. & T. Ry. Co. v. Oklahoma*, 271 U.S. 303, 46 S.Ct. 517, 70 L.Ed. 957.

¹⁵ *NEW ORLEANS WATERWORKS CO. v. LOUISIANA SUGAR REFINING CO.*, 125 U.S. 18, 8 S.Ct. 741, 31 L.Ed. 607, *Black's Cas. Constitutional Law*, 2d, 503.

er it amounts to the enactment of a rule to which the state gives the force of law or merely involves the application of an already existing rule of law to the specific cases within its terms.

WHAT CONTRACTS ARE PROTECTED

258. The provisions of the contract clause protect contracts between states, those between a state and a private person, and those between private persons. They protect both executory and executed contracts, and both express contracts and those implied in fact.
259. The relations of a state to its officers are not contractual, nor are the relations between a state and its subordinate political subdivisions of that character.
260. The existence and construction of a contract for purposes of determining whether subsequent state legislation impairs its obligation in violation of the contract clause is a question of federal constitutional law on which the federal Supreme Court follows its own independent judgment and is not bound by the decisions of a state's own courts.

The only obligations protected by the contract clause against impairment by subsequent legislation are those based on contract. It is, therefore, necessary to establish the existence of the contract creating the particular legal relations that are claimed to be affected by subsequent legislation before this clause can be invoked to protect those relations against change or destruction by subsequent legislation. The existence of such contract is determined by the principles of the law of contracts. It is, therefore, essential that both parties have legal capacity to enter into the particular contract in question, that the parties thereto have intended to enter into it, and that it be not void for any reason whatever. The existence of a contract is generally a question of state law, but this is not the case where the issue is whether it has been impaired in violation of the contract clause. The issue in such case is whether the arrangement in question is a contract within the meaning of that term as used in that clause, and that is an issue of federal constitutional law. It is, accordingly, a well established rule that the federal Supreme Court will in such case determine both the existence and the meaning of a contract by its own independent judgment on those matters regardless of the decisions of a state's

own courts thereon.¹⁶ This rule is followed not only where the contract is between private persons but also where it is one to which a state or one of its political subdivisions is a party.¹⁷ It has in fact had its most important and frequent applications in cases of the latter description. The Supreme Court has, in carrying it out, frequently followed its own views as to the validity under a state constitution of the statute alleged to constitute either the contract or its legal basis.¹⁸ The principal justification for the rule is that it interposes an effective barrier to a state's indirect evasion of the limitations of the contract clause through convenient judicial action by its courts as to the existence or construction of a contract claimed to be impaired by its subsequent legislation. Moreover, the protection of the clause extends to all contracts whether they be between private persons, states of the Union,¹⁹ or a state and private persons.²⁰ The grant of corporate charters, and of special franchises to public utilities, are important examples of the class last mentioned.²¹ The mere grant of a license to conduct a business under a regulatory statute does not constitute a contract between the public and the licensee.²² The clause protects executed as well as executory contracts, and a grant is for its purposes deemed an executed contract implying a continuing promise by the grantor that he will not reassert the rights of which he has disposed thereby.²³ It protects not only express contracts but also those that are implied in fact as distinct from those situations in which the analogy of contract is employed as the legal device for enforcing

16 *NEW ORLEANS WATERWORKS CO. v. LOUISIANA SUGAR REFINING CO.*, 125 U.S. 18, 8 S.Ct. 741, 31 L.Ed. 607, Black's Cas. Constitutional Law, 2d, 508; *Larson v. South Dakota*, 278 U.S. 429, 49 S.Ct. 196, 73 L.Ed. 441; *PIQUA BRANCH OF STATE BANK v. KNOOP*, 16 How. 369, 14 L.Ed. 977, Black's Cas. Constitutional Law, 2d, 548.

17 See cases cited in footnote 16.

18 *Ohio Life Ins. & T. Co. v. Debolt*, 16 How. 416, 14 L.Ed. 997; *McGahey v. Virginia*, 135 U.S. 662, 10 S.Ct. 972, 34 L.Ed. 304.

19 *Green v. Biddle*, 8 Wheat. 1, 5 L.Ed. 547.

20 *Larson v. South Dakota*, 278 U.S. 429, 49 S.Ct. 196, 73 L.Ed. 441; *PIQUA BRANCH OF STATE BANK v. KNOOP*, 16 How. 369, 14 L.Ed. 977, Black's Cas. Constitutional Law, 2d, 548.

21 *DARTMOUTH COLLEGE v. WOODWARD*, 4 Wheat. 518, 4 L.Ed. 629, Black's Cas. Constitutional Law, 2d, 537; *Detroit United Ry. v. Michigan*, 242 U.S. 238, 37 S.Ct. 87, 61 L.Ed. 268.

22 *Mutual Oil Co. v. Zehrung*, D.C., 11 F.2d 887.

23 *FLETCHER v. PECK*, 6 Cranch 87, 3 L.Ed. 162, Black's Cas. Constitutional Law, 2d, 528.

obligations not based on any real consensual transaction.²⁴ Judgments are frequently termed contracts of record, but a judgment obtained in an action sounding in tort is not a contract within the scope of the contract clause.²⁵ It has also been held that the provision of a judgment awarding interest did not make the duty to pay such interest contractual even though the judgment was obtained in an action sounding in contract,²⁶ and a fortiori is that true where the obligation to pay interest on such judgments is imposed by statute.²⁷ It was held in both these cases that subsequent statutes changing the rate of interest on such judgments did not violate the contract clause because the obligation to pay such interest was not one imposed by contract.

The relation between a state and its officers is not one of contract, and the incidents of that relation such as those involving the tenure and compensation of the officer are not protected against change by subsequent legislation by the contract clause.²⁸ It has, however, been held that, after a public officer has rendered services under a law specifying his compensation, there arises an implied contract under which he is entitled to the amounts so fixed for the services actually rendered, and that this implied contract is within the protection of the contract clause.²⁹ The relation of a state to its employees is, however, generally based on a contract, but questions frequently arise as to how far the provisions of statutes regulating the employment in force at the time the employment contract was entered into are part of the contract protected by the contract clause.³⁰ These prin-

²⁴ *Mississippi v. Miller*, 276 U.S. 174, 48 S.Ct. 266, 72 L.Ed. 517.

²⁵ *Louisiana ex rel. Folsom v. New Orleans*, 109 U.S. 235, 3 S.Ct. 211, 27 L.Ed. 936.

²⁶ *Missouri & Arkansas Lbr. & Min. Co. v. Greenwood Dist. of Sebastian County*, 249 U.S. 170, 39 S.Ct. 202, 63 L.Ed. 538.

²⁷ *Morley v. Lake Shore & M. S. R. Co.*, 146 U.S. 162, 13 S.Ct. 54, 36 L. Ed. 925.

²⁸ *Butler v. Pennsylvania*, 10 How. 402, 13 L.Ed. 472.

²⁹ *Mississippi v. Miller*, 276 U.S. 174, 48 S.Ct. 266, 72 L.Ed. 517.

³⁰ *Hall v. Wisconsin*, 103 U.S. 5, 26 L.Ed. 302; see on inclusion of statutory provisions in contract *Phelps v. Board of Education of West New York*, 300 U.S. 319, 57 S.Ct. 483, 81 L.Ed. 674 (provisions of a teacher's tenure statute prohibiting boards of education to reduce salaries of teachers without cause after they had achieved permanent tenure held a regulation of the conduct of such boards and not a term in the teacher's employment contract). Compare *State ex rel. O'Neil v. Blied*, 188 Wis. 442, 206 N.W. 213 (statute establishing system of retirement pensions for teachers, in force when teacher was hired, constitute part of his

ciples are also applicable to the officers and employees of a state's political subdivisions and instrumentalities. The relation between the state and these political subdivisions is not one of contract. Thus municipal charters are not contracts,³¹ nor are grants of power made by the legislature to them or other of the state's political subdivisions such,³² and for that reason subsequent legislation revoking or altering such charters or depriving such subdivisions of those powers are not invalidated by the contract clause. The valid contracts of such municipalities and subdivisions are, however, contracts whose obligations may not be impaired by subsequent legislation.³³ A relationship is not contractual within the meaning of the contract clause merely because based in part upon consent and including some contractual elements. The public interest in marriage as a status has so far prevailed over its contractual elements that it has been held not to be a contract within the provisions of that clause.³⁴

THE OBLIGATION OF THE CONTRACT

261. The obligation of a contract consists of those laws existing at the time it is made which determine its validity and define the scope and content of the promises made by the parties and the character of the performance required thereby, and that insure the aid of government in enforcing the promises and performance thus defined.

The contract clause may be invoked against state legislation only for the protection of contracts entered into before its enactment. It affords no protection to those entered into thereafter.³⁵ That which is protected is not the right to contract but the obligation of an agreement resulting from an exercise of that right. The "obligation" of a contract has been defined as "the law which binds the parties thereto to the performance of

employment contract). See also *Dodge v. Board of Education*, 302 U. S. 74, 58 S.Ct. 98, 82 L.Ed. 57; *State of Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 58 S.Ct. 443, 82 L.Ed. 685.

³¹ *Laramie County v. Albany County*, 92 U.S. 307, 23 L.Ed. 552.

³² *Williamson v. New Jersey*, 130 U.S. 189, 9 S.Ct. 453, 32 L.Ed. 915.

³³ *Detroit United Ry. v. Michigan*, 242 U.S. 238, 37 S.Ct. 87, 61 L.Ed. 268; *Minneapolis v. Minneapolis St. Ry. Co.*, 215 U.S. 417, 30 S.Ct. 118, 54 L.Ed. 259.

³⁴ *Maynard v. Hill*, 125 U.S. 190, 8 S.Ct. 723, 31 L.Ed. 654.

³⁵ *OGDEN v. SAUNDERS*, 12 Wheat. 213, 6 L.Ed. 606, *Black's Cas. Constitutional Law*, 2d, 513.

their agreement.”³⁶ It has also been stated that “the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms”, and that that “principle embraces alike those which affect its validity, construction, discharge and enforcement.”³⁷ It does not include the exact remedy for its enforcement as that existed at the time of its making, but the contract clause does prevent such changes therein as will practically defeat the enforcement of the obligation.³⁸ The obligation thus consists of those laws existing at the time the contract is made which define the scope of the promises made by the parties and the character of the performance required thereby, and that insure the assistance of government in enforcing the promises and performance thus defined.

The scope and content of the promises contained in a contract made in a state and to be performed therein, and the character of the performance required thereby, depend upon the law of that state existing at the time the contract was made. The due process clause of the Fourteenth Amendment prevents any other state from defining that part of the obligation of that contract. The same elements in the obligation of a contract made in one state and performable either therein or elsewhere are governed by the law of the state where made existing at the time it was made, at least with respect to those of its promises performable either there or elsewhere.³⁹ The scope and content of the promises contained in a contract made in one state and performable only in another state are determined by the law of the former, but matters relating to its performance are governed by the law of the state of performance. The contract clause clearly limits the extent to which the states, by whose laws these elements of

³⁶ *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L.Ed. 529.

³⁷ *VON HOFFMAN v. QUINCY*, 4 Wall. 535, 18 L.Ed. 403, Black's Cas. Constitutional Law, 2d, 551.

³⁸ *HOME BUILDING & LOAN ASS'N v. BLAISDELL*, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413, 88 A.L.R. 1481, Black's Cas. Constitutional Law, 2d, 519; *Worthern Co. v. Thomas*, 292 U.S. 426, 54 S.Ct. 816, 78 L.Ed. 1344, 93 A.L.R. 173.

³⁹ *Shlosberg v. New York Life Ins. Co.*, 244 N.Y. 482, 155 N.E. 749. In this case the factors relied upon to establish the contract as one whose obligations were governed by the law of the state whose subsequent legislation was in issue were the domicile of the corporate obligor in that state, the fact that the contract had to be approved at its office therein, and the fact that the obligor's liability was secured by its general assets.

the obligation of a contract are determinable, may affect those elements by their subsequent legislation.⁴⁰ No case has been found deciding whether it limits the state in which performance is required under a contract made elsewhere in affecting its performance by legislation subsequent to the making of the contract, but it should be held so limited on principle. It is unnecessary to invoke the contract clause to defeat the application to a contract, made in one state, of the subsequent legislation of another state that affects the validity, scope and content of the promises contained in such contract, since such legislation is invalid under the due process clause of the Fourteenth Amendment. The same is true with respect to the subsequent legislation of a state other than that in which a contract is performable which assumes to affect its performance. No decisions have been found invoking the contract clause in the two types of cases last mentioned.

The contract clause does, however, limit the states, by whose laws the elements of the obligation already discussed are created and defined, in dealing with the remedy. A cause of action arising out of a contract is transitory in the case of most contracts, and suits thereon are maintainable wherever jurisdiction can be obtained over the defendant, or, under certain conditions, over his property. A case may arise in which a state's only connection with a contract is that it is the forum of an action for its breach. Such a state may not apply its law in determining the validity of such contract, or in defining the scope of its promises and what performance is required thereunder, and that applies both to its law in existence at the time the contract was made and its subsequent enactments. The due process clause, and to some extent, the full faith and credit clause, prohibit it from so doing. The question is whether it can by legislation, enacted after the contract was made, change the remedy in such manner that, had the contract been made and been performable within it, the subsequent legislation would have violated the contract clause as applied to that contract. It has been held that such a change in remedy by the state of the forum violated the contract clause as applied to a contract made in another state.⁴¹ The state of the forum was, however,

⁴⁰ *Sliosberg v. New York Life Ins. Co.*, 244 N.Y. 482, 155 N.E. 749.

⁴¹ *Western Nat. Bank v. Reckless*, C.C., 96 F. 70. In this case the creditor of a Kansas corporation

brought suit in New Jersey against one of the corporate shareholders then domiciled in New Jersey to enforce a liability imposed by Kansas law at the time he had become a

also the state of the domicile of the obligor at the time the suit was brought, but it does not definitely appear whether it was also the state of his domicile at the time the contract was made. The court's theory was that the contract existed within the state of the forum at least from the time the obligor became domiciled therein, and that it became from that time on a contract protected by the contract clause against subsequent legislation of that state impairing its obligation. It cannot, therefore, be definitely held to have decided that the contract clause protects the contracts made in any state against impairment by the subsequent legislation of every other state. The language of the contract clause is broad enough to serve as the premise from which to deduce such a principle. No case has been found determining whether it limits states in applying their legislation retrospectively to contracts made outside the jurisdiction of any one of the several states.

IMPAIRMENT OF THE OBLIGATION

262. A subsequent state enactment may be held not to impair the obligation of prior consensual arrangements if (a) such arrangements do not constitute contracts within the meaning of the contract clause, or (b) if such enactment can be deemed an exercise of an express or implied reservation of power to affect relations, established by prior consensual arrangements that are contracts within the contract clause, in the manner in which such enactment affects them.
263. If such enactment which does affect the obligation of a prior contract cannot be sustained on the basis stated in Section 262 (b), then it will be held to impair the obligation of such contract if it renders it invalid though valid when made, if it changes its terms, if it releases or discharges one party from the performance of his obligations, or if it changes the remedy for its enforcement in such manner as to leave the parties with practically no efficient remedy for its enforcement. A change in remedy that does not have that effect is not in conflict with the contract clause.

The issue that arises whenever state enactments affect relations created by prior consensual transactions is whether the

shareholder. A New Jersey statute (R.S.1937, 14:7-11), enacted after the making of the contract was held to violate the contract clause by depriving the creditor of all right to enforce the obligation although its

laws permitted an action therefor at the time the contract was made. The principal reason for the court's decision was, however, a provision of the New Jersey constitution prohibiting retrospective changes of remedy.

effects produced thereby upon such relations amount to an impairment of the obligation of a prior contract. A state enactment that in fact affects relations based upon prior consensual transactions may be held not to violate the contract clause either because the relation is not based on a contract of the kind protected by that clause, or because the effects produced by the enactment upon a relation admittedly contractual in character do not amount to an impairment thereof in the sense of that conception as found in the contract clause. The courts have developed certain doctrines in relation to these matters that have a wide application in defining the protective scope of that clause. Some of these have already been stated in discussing the contracts that are within its protection. There are several others that merit separate consideration.

Limitation on Power of States to Contract

The first of these is the doctrine that a state legislature has no power to contract not to exercise the state's police power so far as the continuing power to exercise it is necessary to protect or promote the public health, safety and morals. It was for this reason that legislative grants of the privilege of conducting a lottery for a stipulated period in return for the payment of certain sums to the state, and of a private monopoly to operate a slaughter house within a certain city, were held not to constitute contracts, and that subsequent state enactments making the conduct of the lottery illegal, and revoking the monopoly, did not violate the contract clause.⁴² There are, however, certain parts of its police power which a state's legislature may bargain away for a term of years whose duration is usually indicated by the extremely vague phrase "not grossly excessive." It is on this theory that legislative grants of exclusive privileges, limited in duration, to maintain bridges across a specified river, and to operate a public utility within a given city, have been held contracts which were impaired by subsequent legislation derogating from the grant.⁴³ The same principle has been used to sustain as valid contracts protected by the contract clause rate

⁴² *Stone v. Mississippi*, 101 U.S. 814, 25 L.Ed. 1079; *Butchers' Union Slaughter-House & L. S. L. Co. v. Crescent City, L. S. & Slaughter-House Co.*, 111 U.S. 746, 4 S.Ct. 652, 28 L.Ed. 585.

Land & Improv. Co., 1 Wall. 116, 17 L.Ed. 571; *NEW ORLEANS GAS-LIGHT CO. v. LOUISIANA LIGHT & HEAT PRODUCING & MFG. CO.*, 115 U.S. 650, 6 S.Ct. 252, 29 L.Ed. 516, *Black's Cas. Constitutional Law*, 2d, 532.

⁴³ *Bridge Proprietors v. Hoboken*

contracts contained in municipal franchise grants to public utilities.⁴⁴ Nor may a state legislature contract not to exercise its power of eminent domain,⁴⁵ but it may make a binding contract not to exercise its taxing power not only for a limited period but perpetually.⁴⁶ The reason sometimes invoked to support this proposition is that the taxing power, unlike the police power, is not a part of government itself, but this is wholly insubstantial. The power to contract away the state's taxing power is, however, firmly established. State constitutions have in many cases specifically deprived their legislatures of that power. The principle that a state legislature lacks power to bargain away the state's power of eminent domain and certain portions of its police power, and has only a limited power to contract away the remaining portions of its police power, is supported by reasoning that would prevent the state from doing so even by constitutional provisions. The ultimate basis for the doctrine is that the term "contract" as used in the contract clause does not include transactions based on attempts by a state by constitutional provision or legislation to thus curtail its powers of effective government.

Doctrine of Reserved Power

A second principle limiting the protective scope of the contract clause is that a state may affect certain prior contracts by subsequent legislation in ways that might otherwise be deemed to impair their obligation if it has reserved the power to do so by appropriate constitutional or legislative enactment existing at

⁴⁴ *Minneapolis v. Minneapolis St. Ry. Co.*, 215 U.S. 417, 30 S.Ct. 118, 54 L.Ed. 259; *Columbus Ry., Power & Light Co. v. Columbus*, 249 U.S. 399, 39 S.Ct. 349, 63 L.Ed. 669, 6 A.L.R. 1648.

⁴⁵ *Long Island Water-Supply Co. v. Brooklyn*, 166 U.S. 685, 17 S.Ct. 718, 41 L.Ed. 1165; *contributors to Pennsylvania Hospital v. Philadelphia*, 245 U.S. 20, 38 S.Ct. 35, 62 L.Ed. 124. In the latter case the Court formulated the general principle limiting a state legislature's power to bargain away a state's governmental powers in the following language: "There can be now, in view of the many decisions of this court on the subject,

no room for challenging the general proposition that the states cannot by virtue of the contract clause be held to have divested themselves by contract of the right to exert their governmental authority in matters which from their very nature so concern that authority that to restrain its exercise by contract would be a renunciation of power to legislate for the preservation of society or to secure the performance of essential governmental duties."

⁴⁶ *PIQUA BRANCH OF STATE BANK OF OHIO v. KNOOP*, 16 How. 369, 14 L.Ed. 977, *Black's Cas. Constitutional Law*, 2d, 548.

the time the contracts were made or constituting a part of the very state action on which the contracts are based. The principal reason leading to the development of this doctrine was the decision in the Dartmouth College Case that legislative grants of charters to private corporations were contracts protected by the contract clause.⁴⁷ In his concurring opinion in that case Mr. Justice Story suggested that the subsequent amendment or repeal of such a charter would not impair its obligation if the legislation granting it contained a provision reserving those powers to the legislature. The suggestion became the basis for the subsequent legislative practise of reserving those powers in charters thereafter granted whether by special act or under general incorporation acts. The extent to which these reservations have resulted in validating subsequent legislation involving corporations which would otherwise have been held to impair the obligations of the charter contract will be considered when corporate charters are discussed in detail. It is sufficient for present purposes to state that those reservations have at times been made the basis for sustaining subsequent legislation, such as that repealing a charter, which would have violated the contract clause if there had been no reserved power to repeal.⁴⁸ Those reservations have also been frequently made a principal basis for sustaining subsequent legislation affecting corporations which could have been sustained as not violating the contract clause because it constituted a reasonable exercise of the state's police power apart from any specific reservation of power to amend corporate charters.⁴⁹ The doctrine of reserved powers reduces the probability that subsequent state enactments will be held to impair the obligation of prior contracts by making liability to such legislation an element in defining the extent of their obligation. The reservation of power to amend or repeal public grants and charters does not, however, serve to validate all subsequent legislation affecting them and the relations created through the exercise of the powers conferred by them.⁵⁰

⁴⁷ DARTMOUTH COLLEGE v. WOODWARD, 4 Wheat. 518, 4 L.Ed. 629, Black's Cas. Constitutional Law, 2d, 537.

⁴⁸ Greenwood v. Union Freight R. Co., 105 U.S. 13, 26 L.Ed. 961.

⁴⁹ International Bridge Co. v. New York, 254 U.S. 126, 41 S.Ct. 56, 65 L.Ed. 176; Phillips Petroleum Co. v. Jenkins, 297 U.S. 629, 56 S.Ct. 611, 80 L.Ed. 943.

⁵⁰ Coombes v. Getz, 285 U.S. 434, 52 S.Ct. 435, 76 L.Ed. 866.

The Police Power and Legislation Affecting Prior Contracts

The principles discussed in the two preceding paragraphs were developed in connection with contracts to which the public was a party and have had their principal, though not their sole, applications in that field. They have prevented the contract clause from curtailing too severely the continuing exercise of their governmental powers by the states through previous exercises thereof. There has also been developed another general principle operating to prevent the contract clause from unduly restricting the legislative power of the states. That is the principle that every contract is deemed to have been made subject to the reasonable exercise of its police powers by a state. It has been stated that the "reservation of essential attributes of sovereign power is read into contracts as a postulate of the legal order."⁵¹ It operates in the same manner as do the expressly reserved powers, discussed in the preceding paragraph, by defining the extent of the obligation of every contract by factors that include not only the existing laws that define the relations between the parties but also the general postulate that those relations are subject to change by subsequent legislation constituting reasonable exercises of a state's police power. The fact that such legislation modifies relations created by prior contracts is an important consideration in determining its reasonableness, since the issue in such cases is whether the general interest justifies this interference with prior rights and not whether it would justify the measure as a regulation of future transactions. The principle protects the states from having their governmental powers unduly limited and hampered by private contracts immunized against regulatory legislation by the contract clause.

Legislation Affecting Remedies

The foregoing principles prevent state legislation from being held to impair the obligation of prior contracts, either by denying the existence of any contract, or by including as a term of the contract that is admitted to exist an express or implied provision which would render such legislation consistent with, rather than an impairment of, its obligation. There have, however, been many cases in which legislation has been held not to violate the contract clause because it affected only the remedy for

⁵¹ HOME BLDG. & LOAN ASS'N v. BLAISDELL, 290 U.S. 398, 54 S. Ct. 231, 78 L.Ed. 413, 88 A.L.R. 1481, Black's Cas. Constitutional Law, 2d, 519.

enforcing the contract. The remedies available for the enforcement of a contract at the time it is made are not a part of its obligation. The value of that obligation is not dependent on continuing those remedies as they were at that time but on the existence at all times of some remedy for its effective enforcement. The contract clause thus requires that there shall at all times be such an effective remedy available to the contracting parties if such remedy existed at the time the contract was made. The test of the validity under the contract clause of subsequent legislation affecting the remedy is whether the change does or does not materially impair the value of the rights established by a contract.⁵² A reduction in the limitation period for bringing actions on a prior contract is valid if the statute gives the party a reasonable period after its enactment to prosecute his claim.⁵³ A statute that substitutes a proceeding in equity by the receiver of a corporation for individual actions in enforcing a stockholder's statutory liability does not impair the stockholder's contract,⁵⁴ nor does the substitution of a representative suit in equity for an action by an individual against individual stockholders to enforce their liability impair the obligation of the creditor's contract.⁵⁵ A subsequent statute that merely gives an additional remedy to a party entitled to performance of a prior contract, without increasing the other party's obligation, is consistent with the contract clause.⁵⁶ A change of remedies that gives the party as effective a remedy to protect his rights as he had when the contract was made is also valid.⁵⁷ It is only changes in remedy that either indirectly effect a change in the obligation of prior contracts, or render its effective enforcement less probable or impossible, that violate the contract clause.⁵⁸

⁵² *VON HOFFMAN v. QUINCY*, 4 Wall. 535, 18 L.Ed. 403, Black's Cas. Constitutional Law, 2d, 551; *Penniman's Case*, 103 U.S. 714, 26 L.Ed. 602.

⁵³ *Jackson ex dem. Hart v. Lamp-hire*, 3 Pet. 280, 7 L.Ed. 679; *Terry v. Anderson*, 95 U.S. 628, 24 L.Ed. 365.

⁵⁴ *Henley v. Myers*, 215 U.S. 373, 30 S.Ct. 148, 54 L.Ed. 240.

⁵⁵ *Pittsburgh Steel Co. v. Balti-*

more Equitable Soc., 226 U.S. 455, 33 S.Ct. 167, 57 L.Ed. 297.

⁵⁶ *New Orleans C. & L. R. Co. v. Louisiana*, 157 U.S. 219, 15 S.Ct. 581, 39 L.Ed. 679; *Bernheimer v. Converse*, 206 U.S. 516, 27 S.Ct. 755, 51 L.Ed. 1163.

⁵⁷ *Wilson v. Standefer*, 184 U.S. 399, 22 S.Ct. 384, 46 L.Ed. 612.

⁵⁸ *Wilmington & Weldon R. Co. v. King*, 91 U.S. 3, 23 L.Ed. 186; *Fisk v. Jefferson Police Jury*, 116 U.S. 131, 6 S.Ct. 329, 29 L.Ed. 587.

Legislation Affecting Obligation of Prior Contracts

The doctrines of express and implied reservations of power by the states have not been permitted to reduce the contract clause to an empty shell. The obligation may not be extinguished by subsequent enactments, nor may the relations between the parties be completely altered thereby.⁵⁹ The release and discharge of the obligor on a bond under a statute that substituted for the original bond another without the consent of the obligee in the original bond violates the contract clause by destroying the original obligation.⁶⁰ A statute enacted after a state had conveyed public lands to a private corporation which converted a covenant of the corporation into a condition subsequent, and declared a forfeiture of the lands for its breach, impairs the obligation of the grant since it imposes on the grantee a heavier burden than was originally imposed upon it.⁶¹ A subsequent statute which, by repealing an earlier subsequent statute, merely restores the relation of the parties to that which existed under the law in force when the contract was made does not, however, impair its obligations.⁶² The measure of the obligation by which the existence of an invalid impairment is determined is found in the law existing when the contract was made, not in that law as amended by subsequent valid enactments up to the time of the statute alleged to impair its obligation. The subsequent discussion will illustrate the general principles, that have been heretofore considered, in their application to some of the more important types of contract.

⁵⁹ *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L.Ed. 529; *Green v. Biddle*, 8 Wheat. 1, 5 L.Ed. 547.

⁶⁰ *International Steel & Iron Co. v. National Surety Co.*, 297 U.S. 657, 56 S.Ct. 619, 80 L.Ed. 961.

⁶¹ *Columbia Ry., Gas & Electric Co. v. South Carolina*, 261 U.S. 236, 43 S.Ct. 306, 67 L.Ed. 629.

⁶² *Knights Templars' & Masons' Life Ind. Co. v. Jarman*, 187 U.S. 197, 23 S.Ct. 103, 47 L.Ed. 129.

CONTRACTS BETWEEN PRIVATE PERSONS

264. The contract clause protects contracts to which all the parties are private persons against impairment of their obligation by subsequent state legislation.
265. The contract clause has functioned as an important limit on the power of state legislative organs to adjust debtor-creditor relations both during ordinary times and during periods of economic depression. Its interpretations in this field have shown an increasing tendency to recognize what the legislatures are free to regard as the general welfare and to place less emphasis on the individual's right to the precise benefits due him from another under a contract between them. The formal device through which this change of emphasis has been secured is the principle that all contracts are made subject to be affected by reasonable exercises of the police power of the states.

General Considerations

The contract clause protects contracts to which all the parties are private persons, whether those persons be natural persons or corporations. A statute that destroys the obligation of either party to the other under prior contracts is generally held invalid,⁶³ but one whose effect is to permit the enforcement of a promise not enforceable at the time it was made is valid.⁶⁴ The mere fact that a statute destroys the obligation of prior contracts does not invalidate it under the contract clause. Private parties are conclusively deemed to have contracted subject to the reserved power of the state to modify or even to destroy the rights based on their contract so far as necessary to protect the public health, morals or safety. A statute that permitted one riparian owner to construct a dam across a stream in direct violation of his agreement not to do so made prior thereto with an upper riparian owner has been held valid on that basis.⁶⁵ Public utility rates prescribed by authority of a state may be made binding upon a user of the service though their enforcement against him abrogates his prior contract with the utili-

⁶³ *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L.Ed. 529; *White v. Hart*, 13 Wall. 646, 20 L.Ed. 685; *Williams v. Bruffy*, 96 U.S. 176, 24 L.Ed. 716; *International Steel & Iron Co. v. National Surety Co.*, 297 U.S. 657, 56 S.Ct. 319, 80 L.Ed. 961.

⁶⁴ *Ewell v. Daggs*, 108 U.S. 143, 149, 2 S.Ct. 408, 27 L.Ed. 682 (sustaining a statute repealing a statute which voided usurious contracts).

⁶⁵ *Manigault v. Springs*, 199 U.S. 473, 26 S.Ct. 127, 50 L.Ed. 274.

ty.⁶⁶ A statute whose effect was to release lessees from their covenants to surrender the premises upon the expiration of their leases has been held a reasonable exercise of a state's police power during a housing emergency and thus no violation of the contract clause.⁶⁷ The general principle already stated as to the limits of the permissible changes in remedy have been frequently applied to private contracts. Subsequent statutes shortening the period of limitation,⁶⁸ or permitting suit by a bank on a note payable to its cashier,⁶⁹ are valid since they affect merely the method of enforcement without either preventing the effective enforcement of the contract or imposing an additional burden on the obligor. A statute, however, that authorizes a stay of proceedings for a period that may not terminate until the lapse of an unreasonable time, or may even never terminate, practically denies the party the power of enforcing the contract and violates the contract clause. The contingency on which the stay was to end was the recognition of the Russian government by the United States which, at the time the case arose, was highly problematical.⁷⁰

Exemption Laws

The value of a debtor's contractual promises depends largely upon the creditor's power to apply the debtor's property to the satisfaction of his claim. The law governing the liability of the debtor's property to execution as that exists at the time the debt arises is thus an important factor affecting the efficiency of the remedy for its enforcement. It was suggested in *Bronson v. Kinzie*⁷¹ that legislation exempting agricultural implements, a mechanic's tools, and furniture from execution could validly be applied to prior debts and contracts. It has been decided that exempting homesteads not exceeding one thousand dollars in value impaired the obligation of prior contracts by substantially lessening their value.⁷² A statute exempting from liability for the debts of the assured the avails of an insurance policy on his

⁶⁶ *Union Dry Goods Co. v. Georgia Public Service Corp.*, 248 U.S. 372, 39 S.Ct. 117, 63 L.Ed. 309, 9 A.L.R. 1420.

⁶⁷ *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170, 41 S.Ct. 465, 65 L.Ed. 877.

⁶⁸ *Terry v. Anderson*, 95 U.S. 628, 24 L.Ed. 365.

⁶⁹ *Crawford v. Branch Bank of Alabama*, 7 How. 279, 12 L.Ed. 700.

⁷⁰ *Sliosberg v. New York Life Ins. Co.*, 244 N.Y. 482, 155 N.E. 749.

⁷¹ 11 How. 311, 11 L.Ed. 143.

⁷² *Edwards v. Kearzey*, 96 U.S. 595, 24 L.Ed. 793.

life, when payable to his estate, is invalid to the extent that it exempts the proceeds of such policies taken out prior to its passage from being applied to satisfy antecedent debts.⁷³ It is immaterial whether the policies were taken out before or after the debt was incurred if they were taken out prior to the enactment of the statute. A later case applied the same principle to invalidate a statute in its application to antecedent debts which provided that all moneys payable under life insurance policies should be immune from claims of the creditors not only of the insured but also of the beneficiary.⁷⁴ The Court emphasized the facts that the statute placed no limits on the amount exempted, put no restrictions on the beneficiaries in whose favor it would operate, and took no account of conditions and circumstances. It was also these, and the additional facts that the statute was not limited to the period of the emergency and set up no conditions apposite to emergency relief, that made the Court reject the claim that the statute was justified by the economic depression existing when it was enacted. It is unlikely that moderate changes in exemption statutes disadvantageous to creditors will be held to violate the contract clause; it is more probable that such changes, limited in amount and restricted as to the beneficiaries for whom made, will be held valid exercises of the police power, especially if the change is favorable to necessitous debtors or can be supported on other recognized grounds of social policy.

State Insolvency and Moratory Laws

The contract clause has been an important factor in defining the limits within which state legislatures may shift from debtors to creditors the losses that appear inevitable in an economic world that has not achieved complete stability. A principal aim for its adoption was to prevent the wholesale repudiation of public and private debts by state legislation, and it has served that purpose during the numerous economic depressions that have occurred in the course of the nation's history. The power of the several states to enact insolvency laws not in conflict with federal bankruptcy laws was established at an early date.⁷⁵ Their application to prior debts violates the contract clause so far as they undertake to discharge debtors of all liability for such pri-

⁷³ *Bank of Minden v. Clement*, 256 U.S. 126, 41 S.Ct. 408, 65 L.Ed. 857. 292 U.S. 426, 54 S.Ct. 816, 78 L.Ed. 1344, 93 A.L.R. 173.

⁷⁴ *W. B. Worthen Co. v. Thomas*, ⁷⁵ *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L.Ed. 529.

or debts.⁷⁶ They do not violate it as applied to subsequent contracts.⁷⁷ A statute that may effect a partial or total discharge of pre-existing debts is equally invalid, and one that permits the debtors on such claims to reduce the amount owed by losses due to causes unrelated to the contract or actions of the creditor is invalid for that reason.⁷⁸ It is immaterial whether the subsequent enactments that effect those results operate directly upon the debtor's obligation or upon the creditor's remedy for its enforcement.

State legislatures have, during periods of economic distress, been especially desirous of protecting mortgagors against the loss of the mortgaged property securing their borrowings. They have attempted to secure that objective by legislation authorizing or requiring delay in the foreclosure of the mortgage or in the sale of the property under powers of sale contained in the mortgage, granting or extending periods of redemption of the mortgaged premises, and regulating the exercise of the mortgagee's right to a deficiency judgment. The earlier decisions involving such legislation generally held it invalid under the contract clause. Thus subsequent legislation giving a period of redemption when none had existed under the law in force when the mortgage was given, or extending the period of redemption, was held to impair unconstitutionally the obligation of pre-existing mortgages.⁷⁹ Attempts to protect the mortgagor's interest by prohibiting sales on foreclosure, or under powers of sale contained in mortgages, unless the amount bid at the sale equalled specified fractions

⁷⁶ *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L.Ed. 529.

⁷⁷ *OGDEN v. SAUNDERS*, 12 Wheat. 213, 6 L.Ed. 606, Black's Cas. Constitutional Law, 2d, 513. It should be noted that discharges of a debtor under an insolvency act of a state in force when the debt arose is not valid against non-residents unless they voluntarily become parties to the insolvency proceedings or are made such through proper service of process upon them. The basis of this limitation is not the contract clause but the principle, now reinforced by the due process clause of the Fourteenth Amendment, U.S.C.A. Const., that a state's laws have no extraterritorial force. See the cited

case and also *Baldwin v. Hale*, 1 Wall. 223, 17 L.Ed. 531.

⁷⁸ *Walker v. Whitehead*, 16 Wall. 314, 315, 21 L.Ed. 357.

⁷⁹ *Bronson v. Kinzie*, 1 How. 311, 11 L.Ed. 143; *Barnitz v. Beverly*, 163 U.S. 118, 16 S.Ct. 1042, 41 L.Ed. 93. The rights of a purchaser at a foreclosure sale, who is not the creditor nor one standing in his shoes, are governed by the law in force at the time of the sale, and a statute giving a right to redeem which was enacted after the mortgage was executed but before the sale occurred does not violate the contract clause; *Hooker v. Burr*, 194 U.S. 415, 24 S.Ct. 706, 43 L.Ed. 1046.

of the appraised value of the mortgaged premises were also held to violate the contract clause.⁸⁰ The inevitable result of legislation of both these types was the unconditional and uncompensated postponement of the mortgagee's right to possession of the premises beyond the time when he would have been entitled thereto under his agreement, and the possible defeat of that right completely. The sale of mortgaged premises to collect the debt will frequently realize less than the amount due, particularly during depression periods. The mortgagee-creditor is frequently the only bidder for the premises at such times. It has been held that the obligation of prior mortgages was invalidly impaired by legislation forbidding a second sale of the premises after their redemption by the mortgagor from their sale to the mortgagee on the foreclosure of the mortgage where the second sale was for the purpose of enforcing the collection of the amount unpaid on the mortgage debt.⁸¹ The necessary result of such legislation is, as a minimum, the creation of an exemption in favor of the debtor in respect of the very property which he had mortgaged to secure the creditor. A more extreme device to compel the mortgagee-creditor to bid at least the amount due him on the sale of the mortgaged premises is furnished by a statute which penalized a mortgagee in possession, who had acquired the premises on foreclosure for less than the amount due him, by forfeiting his title and right to possession to the mortgagor, who had failed to redeem, for the former's failure to procure a deed to the premises within a prescribed time, even though the mortgagor had paid nothing on the mortgage debt. A statute of that character in effect deprived the mortgagee-creditor, under the guise of a penalty, not only of his claim but of his property, and was held to violate the contract clause as applied to prior mortgages.⁸² The course of decision prior to the depression that began during 1929 had accorded creditors a degree of protection beyond that which they have received under the decisions involving the legislation induced by that depression.

The inflated credit structure which collapsed during the early years of the depression last referred to produced the usual pro-

⁸⁰ *Bronson v. Kinzie*, 1 How. 311, 11 L.Ed. 143. The same principle was applied to hold invalid, as applied to prior debts, a similar statute applying to execution sales of real estate, *Gantly's Lessee v. Ewing*, 3 How. 707, 11 L.Ed. 794.

⁸¹ *Barnitz v. Beverly*, 163 U.S. 118, 16 S.Ct. 1042, 41 L.Ed. 93.

⁸² *Bradley v. Lightcap*, 195 U.S. 1, 24 S.Ct. 748, 49 L.Ed. 65.

fusion of legislation for the relief of debtors, and the customary attacks thereon predicated on the contract clause. The extent of the collapse of values entailed so great a risk to the stability of the social structure as to create a situation that legislatures might reasonably regard as an emergency. The principle that legislation affecting contractual obligations would not violate the contract clause if it could be deemed a reasonable exercise of the police power of the states was successfully invoked to sustain much of the legislation of this period against claims that it violated that clause in its application to prior contracts. The doctrine was most forcefully enunciated in the first decision of the Supreme Court in passing on the validity of debtor-relief enactments of this period.⁸³ Much of such legislation dealt with the problem by enabling debtors to invoke judicial assistance in compelling creditors to delay the enforcement of their contractual rights for limited periods. A statute postponing foreclosure sales for a reasonable period was held not to invalidly impair the obligation of prior mortgages.⁸⁴ However, a statute authorizing a governor to declare legal holidays for 60 days during which real estate mortgage foreclosures were prohibited, and apparently empowering him to repeat the process indefinitely, was held to violate the contract clause as applied to existing mortgages.⁸⁵ Legislation extending the period of redemption for such time as the court might deem just and equitable on condition that the mortgagor pay over all or a reasonable part of the income from the property, or its reasonable rental value, for use in paying the taxes and insurance thereon and the interest on the indebtedness, and authorizing the court to terminate the extended period on the mortgagor's default therein, was held a reasonable exercise of the police power in the then existing emergency, and thus not to impair the obligation of a prior mortgage under which the premises had already been sold to the mortgagee-creditor.⁸⁶ The earlier decisions were distinguished on the score that the legislation involved in them had provided for unconditional extensions of the right to redeem and had contained no provisions adequately protecting the creditor's interests.

⁸³ *HOME BLDG. & LOAN ASS'N v. BLAISDELL*, 290 U.S. 398, 54 S. Ct. 231, 78 L.Ed. 413, 88 A.L.R. 1481, Black's Cas. Constitutional Law, 2d, 519.

⁸⁴ *State ex rel. Lichtscheidl v. Moeller*, 189 Minn. 412, 249 N.W. 330.

⁸⁵ *Alliance Trust Co. v. Hall, D.C.*, 5 F.Supp. 285.

⁸⁶ *HOME BLDG. & LOAN ASS'N v. BLAISDELL*, 290 U.S. 398, 54 S. Ct. 231, 78 L.Ed. 413, 88 A.L.R. 1481, Black's Cas. Constitutional Law, 2d, 519.

The adequate protection of the debtor's interests was also felt to require legislation dealing with the creditor's right to enforce the debtor's personal liability on his promise to pay. This assumed two principal forms: (a) legislation aiming to delay its enforcement, and (b) legislation limiting the amount thereof in those cases in which the sale of mortgaged premises had failed to realize the full amount of the debt. A statute of the former type which resulted in an unconditional delay for a rather short period was held invalid as applied to prior debts,⁸⁷ but another court intimated very definitely that one granting delay for a reasonable period on condition that the debtor pay taxes on the mortgaged premises and interest on the debt would be valid even as applied to prior debts.⁸⁸ The reasoning sustaining reasonable delays in the enforcement of the debt by resort to the security would support similar delays in the enforcement of the debt itself. The devices employed by legislation limiting the creditor's right to enforce the debtor's personal liability have varied from state to state, and an adequate account of the decisions on their validity as applied to prior debts must recognize these variations. A statute permitting the debtor to enjoin the confirmation of a sale of the mortgaged premises under a power of sale contained in the mortgage, if the amount bid was inadequate and inequitable, has been held consistent with the contract clause,⁸⁹ but one precluding the entry of a deficiency judgment unless the foreclosure sale was confirmed with a finding that the property had brought its true market value was stated to be invalid thereunder.⁹⁰ The difference between these statutes is that the former would affect the amount of any deficiency judgment that might be obtained without depriving the creditor of his right thereto, while the latter might completely deprive him of his right to obtain one. Furthermore, the former would not enable the debtor to escape any part of his obligation while the latter might have that effect under certain circumstances. The avoidance of the latter result is also the ultimate justification for the decisions holding invalid under the contract clause statutes that in terms or in effect prohibit deficiency judgments.⁹¹

⁸⁷ *Brown v. Ferdon*, 5 Cal.2d 226, 54 P.2d 712.

⁸⁸ *Klinke v. Samuels*, 264 N.Y. 144, 190 N.E. 324.

⁸⁹ *Woltz v. Asheville Safe Deposit Co.*, 206 N.C. 239, 173 S.E. 587.

⁹⁰ *Atlantic Loan Co. v. Peterson*, 181 Ga. 266, 182 S.E. 15 (dictum).

⁹¹ *Adams v. Spillyards*, 187 Ark. 641, 61 S.W.2d 686, 86 A.L.R. 1493 (statute forbade entry of decree of foreclosure unless plaintiff stipulat-

The other principal form of legislation limiting the creditor's right to enforce the debtor's personal liability limited the amount recoverable under a deficiency judgment to an amount equal to the difference between the amount due the mortgagee-creditor on the debt, including unpaid interest and costs, and the actual value of the mortgaged property at the time of its sale. The effects of such statutes would be to limit the creditor to recovering the face amount of the debt due him plus unpaid interest and costs in every case in which he bought in the property on its sale to satisfy his claim, and to prevent him in such case from being enriched beyond that amount to the extent that the value of such property exceeded the amount realized on its sale. It was for such reasons that the application of such statutes to prior debts and mortgages was held not to impair their obligation invalidly.⁹² The same justification would not in fact exist where the property was bought at the sale by either the mortgagor or a wholly independent third party. The application of such statutes to such cases would involve a real and permanent shifting of the loss from the debtor to the creditor, enable the debtor to pay his debt by a method involving an increase in his net wealth if he were the buyer, and force the creditor to confer a benefit upon the third party if he were the buyer. It has, accordingly, been held that the contract clause is violated by applying such statute to prior debts in a case in which the mortgagor himself purchased the property on the foreclosure sale.⁹³ No case has been found in which the facts specifically showed a purchase by an independent third party, but the prin-

ed that he would bid amount of loan, interest and costs remaining due to time of decree); *Kresos v. White*, 47 Ariz. 175, 54 P.2d 800 (statute prohibited deficiency judgment unless the mortgagee, or his assignee, proved that the value of the mortgaged premises at the time of the execution of the mortgage was not in excess of the amount remaining due on the debt after the foreclosure sale, or that the depreciation in value was caused by some act of the mortgagor, and limited recovery to the difference between the said value and the amount due on the debt).

⁹² *Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.*,

300 U.S. 124, 57 S.Ct. 338, 81 L.Ed. 552, 108 A.L.R. 836. The state decisions were in general contra to this decision, and may still be law so far as they furnish a basis for construing such equivalents of the contract clause as may be found in the constitutions of such states; see *Bennett v. Superior Court of Los Angeles County*, 5 Cal.App.2d 13, 42 P.2d 80; *Sayre v. Duffy*, 179 A. 459, 13 N.J.Misc. 458; *Langever v. Miller*, 124 Tex. 80, 76 S.W.2d 1025, 96 A.L.R. 836.

⁹³ *Vanderbilt v. Brunton Piano Co.*, 111 N.J.L. 596, 169 A. 177, 89 A.L.R. 1080.

cial reason that invalidates such statute where the mortgagor buys the property is present in that instance also. The enforcement of similar legislation allowing the fair value of the mortgaged premises to be set-off against the creditor's claim when he sues to enforce the debtor's personal liability thereon involves peculiar difficulties if he should proceed in that manner prior to bringing foreclosure proceedings, since that would cast on the creditor the risks of any drop in value between the time of his action and that when the property was sold on foreclosure. The validity of such statute has, however, been sustained as applied to pre-existing debts.⁹⁴ A statute that permits a deficiency judgment to be satisfied by the mere failure of the mortgagee-purchaser of the mortgaged premises to procure a judicial determination of their value within a limited period after their sale violates the contract clause as applied to prior debts by destroying part of their obligation.⁹⁵ A milder form of statute aiming to prevent an undue sacrifice of the debtor's interest, and reducing the amount of any deficiency judgment obtainable against him, is that which permits the mortgagor to obtain a judicial resale of the mortgaged premises if the price obtained on a sale under a power of sale contained in the mortgage be inadequate. Its validity as applied to prior debts has been sustained.⁹⁶ It is quite apparent that these decisions manifest "a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare" when they are contrasted with the decisions of earlier periods.⁹⁷ The same broad conceptions of public welfare were the basis for sustaining statutes that provided for the liquidation or reorganization of such financial corporations as mortgage investment companies and state banks although these almost invariably included provisions for forcing readjustments of their claims upon non-assenting creditors by action of specified percentages of creditors, for the "freezing" of deposits, and for other departures from the strict letter of the contracts of

⁹⁴ *Klinke v. Samuels*, 264 N.Y. 144, 190 N.E. 324.

⁹⁵ *Beaver County Bldg. & Loan Ass'n v. Winowich*, 323 Pa. 483, 187 A. 481, 921.

⁹⁶ *Miller v. Shore*, 206 N.C. 732, 175 S.E. 133; *Barringer v. Wilmington Savings & Trust Co.*, 207 N.C. 505, 177 S.E. 795.

⁹⁷ The quoted portion of the sentence is from the opinion of Mr. Chief Justice Hughes in *HOME BUILDING & LOAN ASS'N v. BLAISDELL*, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413, 88 A.L.R. 1481, *Black's Cas. Constitutional Law*, 2d, 519.

such insolvent or financially embarrassed debtors.⁹⁸ These were generally deemed reasonable exercises of a state's police power to insure an orderly adjustment of a debtor's affairs in order to secure an equal and equitable application of his assets for the benefit of creditors.

PUBLIC CONTRACTS

266. The contracts protected by the contract clause include those between a state, or any of its subordinate political subdivisions, and private persons.
267. The contracts between a state's subordinate political subdivisions and private persons may be modified by subsequent legislation without the consent of such subdivision, but not without the consent of the private persons who are parties thereto.
268. The contracts between a state itself and private persons are subject to a continuing power in the former to assert its privilege of immunity from suit without its consent.
269. The bonds issued by a state, or its subordinate political subdivisions, are contracts whose ultimate security is generally the taxing power of the obligor, and subsequent legislation completely or partially depriving the obligors of their power to tax to meet their obligations on such bonds invalidly impairs their obligation.

Public Contracts that are Protected

Contracts between a state, or any of its political subdivisions, and private persons are within the protection of the contract clause. There are included among such contracts grants by them of their publicly owned property,⁹⁹ agreements with their employees as distinguished from their relations with their officers,¹ bonds issued by them,² and obligations assumed by them in con-

⁹⁸ *In re People*, by Van Schaick (Title & Mtge. Guar. Co.), 264 N.Y. 69, 190 N.E. 153, 96 A.L.R. 297; *Savings Inv. & Trust Co. v. Associated Bankers Title & Mtge. Guaranty Co.*, 122 N.J.Eq. 95, 192 A. 584; *In re Mechanics Trust Co.*, 119 N.J.Eq. 141, 181 A. 423; *Doty v. Love*, 295 U.S. 64, 55 S.Ct. 553, 79 L.Ed. 1303, 96 A.L.R. 1438. *Contra*, *Ghingher v. Pearson*, 165 Md. 273, 168 A. 105.

⁹⁹ *FLETCHER v. PECK*, 6 Cranch 87, 3 L.Ed. 162, Black's Cas. Constitutional Law, 2d, 528.

¹ *Hall v. Wisconsin*, 103 U.S. 5, 26 L.Ed. 302.

² *VON HOFFMAN v. QUINCY*, 4 Wall. 535, 18 L.Ed. 403, Black's Cas. Constitutional Law, 2d, 551.

nection with grants of property to them.³ They can enter into contracts only through action by duly authorized representatives, and there exists in most states a considerable body of legislation regulating various phases of public contracts and the relations established thereby. It is often difficult to determine how much thereof enters into and becomes a part of the public contracts made while it is in force. It is generally held that the provisions of teachers' tenure and salary statutes are regulations of the conduct of the officials charged with the employment of teachers and constitute no part of the contract made by them in the exercise of their powers.⁴ The decisions are not in accord as to whether legislation establishing systems of retirement pensions for public employees creates contractual relations with public employees in respect of those pensions or merely provides for a gratuity which the state or its subdivisions are free to abolish or reduce both before and after an employee has satisfied the conditions on which his right thereto accrues.⁵ It is

³ *Adams v. Plunkett*, 274 Mass. 453, 175 N.E. 60.

⁴ *Phelps v. Board of Education of West*, 300 U.S. 319, 57 S.Ct. 483, 81 L.Ed. 674. See also *Dodge v. Board of Education*, 302 U.S. 74, 58 S.Ct. 98, 82 L.Ed. 57; *State of Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 58 S.Ct. 443, 82 L.Ed. 685.

⁵ *Trotzler v. McElroy*, 182 Ga. 719, 186 S.E. 817 (holding the relationship of a city and an employee in respect to such find contractual so that subsequent legislation reducing its amount after the employee's right to a pension had accrued violated the contract clause); *Roddy v. Valentine*, 268 N.Y. 228, 197 N.E. 260 (accord, but stating that, up to the time the employee's rights accrue, the relation is not contractual; in this case the fund was in part made up of deductions from employee's salary); *People ex rel. v. Retirement Board of Policemen's Annuity and Benefit Fund*, 326 Ill. 579, 158 N.E. 220, 54 A.L.R. 940 (involved no constitutional issue, but court stated that an employee's interest under

such a plan was not contractual in character involving a public obligation to continue to pay the pension); *Pennie v. Reis*, 132 U.S. 464, 10 S.Ct. 149, 33 L.Ed. 426 (involved no constitutional issue, but Court took the position that the pensioner's interest, until right to receive it accrues, is not a contractual one); *State ex rel. O'Neil v. Blied*, 188 Wis. 442, 206 N.W. 213 (holding that teacher was entitled to accumulations to his credit in a state retirement fund established by a statute existing when his contract of employment was made on the theory that such statute became part of his contract); *Dodge v. Board of Education*, 302 U.S. 74, 58 S.Ct. 98, 82 L.Ed. 57 (holding that a subsequent statute reducing the pension payable to retired teachers under a statutory non-contributing plan did not violate the contract clause because the relation of the public and the teachers with respect to that plan was not contractual). It should be noted that the terms of the statutes are decisive of the character of the relation of the employee to such funds

universally held, however, that the relation between a state and its political subdivisions and their officers is not one of contract,⁶ and the same is true of the relation between a state and its political subdivisions.⁷ The former's grants of power to the latter are not contracts and may be withdrawn at any time so far as the contract clause is concerned.⁸ That clause does not prohibit a state and its political subdivision from breaching their contracts, but does prevent them from successfully invoking legislation enacted after those contracts were made as a legal justification for their breach unless such legislation can be justified as an exercise of an expressly or impliedly reserved power. Public contracts stand on the same footing in this respect as do purely private contracts.

Contracts of State's Subordinate Political Subdivisions

Contracts between the subordinate political subdivisions of a state and private persons occupy a special position due to the fact that such subdivisions are mere creatures or agencies of the state subject to its continuing control. Their only power to contract comes from the state, is usually conferred upon them by legislation, and is exercised by them as its agents or instrumentalities. The contracts made by them within the scope of their delegated powers bind both them and the private parties thereto, and such contracts are protected by the contract clause against impairment of their obligation by subsequent legislation so far as the rights of private persons under those contracts are concerned. The rights of the subordinate political subdivisions under them are not, however, protected by the contract clause against alteration or abrogation by subsequent legislation. The state, acting by its legislature, may assert its supremacy and continuing control over its creatures by modifying or cancelling the contracts which they have made as its agents or instrumentalities. The contract clause does not prohibit the parties to a contract from agreeing to alter or abrogate their contracts even when that result is produced, as it generally is in cases of this kind, by legislative action. The state is, in a real sense, an ultimate party to all such contracts made by its subordinate political subdivisions. These principles have received their principal application in connection with municipal franchise grants

⁶ *Butler v. Pennsylvania*, 10 How. 402, 13 L.Ed. 472.

182, 43 S.Ct. 534, 67 L.Ed. 937, 29 A.L.R. 1471.

⁷ *Trenton v. New Jersey*, 262 U.S.

⁸ *Williamson v. New Jersey*, 130 U.S. 189, 9 S.Ct. 453, 32 L.Ed. 915.

to local public utilities, especially where those franchises have contained rate provisions. The franchise granted by a municipality to a public utility is a contract if the municipality has the statutory or constitutional power to enter into a contract of that character, and this applies not only to those franchise provisions conferring special privileges upon the utility but also to any provisions dealing with rates chargeable by it.⁹ The rate provisions, if contractual in character, bind both the utility and the municipality.¹⁰ A subsequent legislative change of rates invalidly impairs the obligation of that contract unless assented to by the utility.¹¹ The municipality, however, has no right under the contract clause to the continuance of the contract rates if the state legislature alters them with the assent of the utility.¹² The rise in the price level during the period of the World War induced considerable legislation of this character which was sustained by the federal Supreme Court against objections based on the contract clause, made by the municipalities, in every case coming before it. The same principles have been applied in connection with other than the rate provisions of such franchises, such as those imposing on the utility the duty to pave and maintain certain portions of the streets on which its tracks were located.¹³ The net result of the decisions in this class of cases is that the rights of the private utility under such franchise contracts are protected by the contract clause against change or abrogation by subsequent legislation, while those of the municipality thereunder enjoy no such protection. The result is the logical consequence of the legal relation existing between a state

⁹ The power of a state to contract away its power to fix rates for limited periods has been sustained, *Railroad Commission of California v. Los Angeles Ry. Corp.*, 280 U.S. 145, 50 S.Ct. 71, 74 L.Ed. 234. In support of the doctrine of the text see *Minneapolis v. Minneapolis St. Ry. Co.*, 215 U.S. 417, 30 S.Ct. 118, 54 L.Ed. 259. The municipality and the utility must also have intended to make a contract, but this is assumed to have been the intention in the cases in which the problem under discussion was considered.

¹⁰ That they bind the utility see *Georgia Ry. & Power Co. v. Decatur*, 262 U.S. 432, 43 S.Ct. 613, 67 L.

Ed. 1065; *Columbus Ry., Power & Light Co. v. Columbus*, 249 U.S. 399, 39 S.Ct. 349, 63 L.Ed. 669, 6 A.L.R. 1648. That they bind the municipality, see *Minneapolis v. Minneapolis St. Ry. Co.*, 215 U.S. 417, 30 S.Ct. 118, 54 L.Ed. 259.

¹¹ *Detroit United Ry. v. Michigan*, 242 U.S. 238, 37 S.Ct. 87, 61 L.Ed. 268.

¹² *Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U.S. 394, 39 S.Ct. 526, 63 L.Ed. 1054; *City of Tulsa v. Oklahoma Natural Gas Co.*, D.C., 4 F.2d 399.

¹³ *Worcester v. Worcester Consol. St. Ry. Co.*, 196 U.S. 539, 25 S.Ct. 327, 49 L.Ed. 591.

and its subordinate political subdivisions. The same principles would apply to subsequent changes in such contracts by amendments of a state's constitution, whether the power of the municipality to make such contract were derived from the constitution directly or from legislation authorized thereby, since such amendment of the constitution constitutes the enactment of a law within the provisions of the contract clause. If the legislature should attempt to change such a contract made by a municipality under a power derived immediately from the state's constitution, there would arise a prior question as to the validity of such legislation under the state constitution. If the legislation were held invalid on that score, there would be no issue under the contract clause; if it were sustained against that objection, there would arise an issue under the contract clause the solution of which would be the same as if the municipality's power to make the contract had been derived from the legislature.

State's Immunity from Suits on Its Contracts

A state is not suable in a federal court on its contracts with private persons,¹⁴ nor in its own courts without its consent. The question of whether the contract clause prevents it from withdrawing a consent which it had given under the law existing at the time it entered into a contract has been considered in several cases by the Supreme Court of the United States. The repeal of a statute giving its consent to be sued clearly deprives the private person who is a party to the state's contract, made while a statute granting its consent was in force, of a remedy without the substitution therefor of an equally efficacious remedy, and generally deprives that party of all remedy to enforce the state's promises. Legislation affecting prior private contracts in that manner would be invalid as impairing their obligation. There have been decisions sustaining subsequent legislation, repealing the statutes that embodied the state's consent to be sued, based not on a general principle that the contract clause permits such action regardless of the character of the former consent, but rather on the character of the original consent. A statute in force when the state entered into a contract provided that its creditors under such contracts might sue it in order to obtain a judicial determination of the existence and the amount of the claim, but that the judgment therein should not be enforci-

¹⁴ U.S.C.A. Const., Amend. 11; *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842.

ble against the state but operate as a mere recommendation to the state legislature. A subsequent statute repealing such limited consent does not violate the contract clause as applied to such prior contract, since it does not deprive the private party thereto of any effective remedy belonging to him at the time he entered into it.¹⁵ The remedy which the contract clause protects must include provision for the enforcement of the results of a judicial inquiry into the state's liability. Cases of this type are not decisive of a state's power to withdraw its consent where the legislation granting it gives the other party to the contract a remedy that includes enforcement against the state of any judgment that might be obtained against it. The assumption that the contract clause does not prevent the repeal of such legislation even as applied to contracts made while it was in force underlies an argument sustaining a statute, enacted after a state had issued its bonds, which imposed burdensome conditions on the bondholders' suits against the state. The change in remedy was held not to violate the contract clause because it was less extreme than would have been a complete withdrawal of its consent to be sued which it might validly have done. It was the theory of this case that a statute waiving a state's immunity from suit by private parties is neither itself a contract nor a term in contracts made by a state while such statute is in force.¹⁶ This doctrine was later re-asserted and represents the existing law on that subject.¹⁷ The subordinate political subdivisions of a state possess no such immunity from suit as belongs to the state.

Bonds of the State and Its Subdivisions

The contract clause has frequently been invoked to prevent the repudiation of their bonds by a state and its political subdivisions. These bonds are contracts within the purview of that clause which prevents a state not only from directly altering or repudiating their terms by legislation enacted after their issuance, but also from depriving them thereby of the means of their effective enforcement except that a state may validly withdraw its prior consent to be sued on its own bonds.¹⁸ State and municipal bonds are often issued when existing state constitutional or statutory provisions exempt them from taxation, and

¹⁵ *Memphis & C. R. Co. v. Tennessee*, 101 U.S. 337, 25 L.Ed. 960; *Baltzer v. North Carolina*, 161 U.S. 240, 16 S.Ct. 500, 40 L.Ed. 684.

¹⁶ *Beers use of Platenius v. Arkansas*, 20 How. 527, 15 L.Ed. 991.

¹⁷ *Ex parte Ayers*, 123 U.S. 443, 8 S.Ct. 164, 31 L.Ed. 216 (dictum).

¹⁸ *VON HOFFMAN v. QUINCY*, 4 Wall. 535, 18 L.Ed. 403, *Black's Cas. Constitutional Law*, 2d, 551.

in some cases the terms of the bonds expressly or impliedly confer such an immunity. The imposition of taxes upon the capital value of, or the interest upon, such bonds under statutes enacted after their issue has been held to impair their obligation in several cases. The subsequent enactment in one such case not only imposed a tax but authorized the debtor municipality to withhold it from the interest payable on the bond. This was held to impair the obligation of the bonds to pay the nominal rate of interest to the owner of the bond and no other, that other being the tax collector.¹⁹ This case may be construed as not deciding that the bonds were contractually free from the tax but merely holding that they were by contract immune to the collection of a valid tax by the method adopted. It has, however, been definitely held that the existence at the time of the issue of state or municipal bonds of a statute exempting them from taxation created a contract that exempted both their principal and interest from both direct and indirect taxation. The taxing statute held to impair that obligation in that case required the inclusion of their interest in the income by which a corporate franchise tax was measured.²⁰ The practical scope of that decision was in fact greatly narrowed by a subsequent decision. The state supreme court had construed a state constitutional provision that state and municipal bonds should be exempt from taxation as protecting the bonds and interest thereon from direct taxation only, and as not including immunity from indirect taxation through their inclusion in the measure of other taxes. It was held that such a construction was a permissible one, and that the inclusion of the interest on such bonds in measuring a corporate franchise tax did not impair their obligation.²¹ The former case was distinguished in a manner that greatly impairs its authority, and the doctrine was asserted that a legislative intent to do what the Constitution permitted could neither alter the terms of the contract nor invalidate the state's exercise of its power to accomplish such purpose. It was an essential assumption of the reasoning in the later decision that the state court's interpretation of the scope of the contractual immunity was fair and justified. The decision would have been other than it was if the federal Supreme Court, in the exercise of its power to determine the existence and terms of the contract on the basis of its own independent judgment, had con-

¹⁹ *Murray v. Charleston*, 96 U.S. 432, 24 L.Ed. 760.

chusetts, 279 U.S. 620, 49 S.Ct. 432, 73 L.Ed. 874, 65 A.L.R. 866.

²⁰ *Macallen Co. v. Com. of Massa-*

21 Pacific Co. v. Johnson, 285 U.S. 480, 52 S.Ct. 424, 76 L.Ed. 893.

cluded that the state court's construction of the contract was unjustified and forced. An even more recent case involved public bonds issued at a time when the state statutes exempted them from taxation. It was nevertheless held that a subsequently enacted state income tax law did not impair their obligation insofar as it required the inclusion of their interest in gross income.²² The state court's construction of the contract was held reasonable and justified. The federal Supreme Court followed the state court in assuming that the statutory provisions created a contract, but it seems not improbable that future decisions may deny that basic assumption. There have been other benefits than immunity from taxation conferred by public bonds upon their holders. There is an important series of decisions involving attempts by a state to repudiate indirectly a provision in its bonds under which their interest coupons were receivable for taxes due the state. The subsequent legislation generally so hedged about the duty of the state to accept the coupons when tendered for state taxes that holders of the coupons were practically prevented from using them therefor because of expenses necessarily incurred in making their rights effective, or because of inability to meet conditions imposed on their use for that purpose which were not justifiable as reasonable means for insuring that the coupons tendered were genuine. A statute requiring their owner to make a deposit pending the determination of the genuineness of tendered coupons is valid,²³ but requiring the tax to be paid in money and remitting the owner of the coupon to a suit to recover the amount paid violates the obligation of the bond contract.²⁴ Statutes limiting to an unreasonably short period the right to establish the genuineness of the coupon, and requiring that to be established by producing the bond from which the coupon had been detached, were held to violate the contract clause because unreasonably burdening the right of the coupon owner to use it as permitted by the terms of the bond.²⁵ The contract clause prevented the state in these cases from repudiating its obligation by indirection.

The ultimate security of public bonds and other public monetary obligations, based on contract, is generally the taxing power of the political unit issuing the bonds or incurring such obliga-

²² *Hale v. Iowa State Board of Assessment & Review*, 302 U.S. 95, 58 S.Ct. 102, 82 L.Ed. 72.

²⁴ *Poindexter v. Greenhow*, 114 U.S. 270, 5 S.Ct. 903, 962, 29 L.Ed. 185.

²⁵ *McGahey v. Virginia*, 135 U.S.

²³ *Antoni v. Greenhow*, 107 U.S. 662, 10 S.Ct. 972, 34 L.Ed. 304.
769, 2 S.Ct. 91, 27 L.Ed. 468.

tions. Such bonds are frequently issued under the authority of statutes that specifically require the levy of specified taxes for the payment of principal and interest. They are, however, deemed to have been issued on the faith of the taxing powers belonging to the obligor at the time of their issue even when the legislation authorizing their issue makes no such specific provision for the levy of specified taxes.²⁶ The same principles have been applied to other monetary obligations, based on contract, validly incurred by a state and its political subdivisions in the exercise of their powers.²⁷ Legislation depriving the obligor of the power to impose the taxes specifically provided for by the law under which the bonds were issued impairs their obligation in violation of the contract clause, and the duty of the proper public officials to make such levies continues until the obligation of the bonds has been completely discharged.²⁸ If the statute under which they were issued and the law in force at the time of their issue provided for the assessment of taxes on the full value of the taxable property, a subsequent statute providing for an assessment at a lesser value is invalid, and the proper authorities can be compelled to levy taxes on the former basis.²⁹ A subsequent enactment whose effect is to permit the bonds themselves, or the interest coupons thereon, to be accepted at par in payment of the taxes required to service the bonds instead of in cash as required under law in force when the bonds were issued is invalid, at least when the bonds are below par when thus accepted. A statute specifically authorizing the payment of the required taxes by this method clearly has that effect and is invalid,³⁰ and one which permits such bonds to be so used to redeem tax certificates held by the state covering land subject to taxation to service those bonds has also been held to have that effect and to be invalid on that score. A bondholder may, accordingly, enjoin the proper authorities from so accepting such bonds and coupons, and is not entitled to compel those authorities to accept them for that purpose.³¹ Subsequent leg-

²⁶ *Wolff v. New Orleans*, 103 U.S. 358, 26 L.Ed. 395.

²⁷ *Louisiana ex rel. Hubert v. New Orleans*, 215 U.S. 170, 30 S.Ct. 40, 54 L.Ed. 144.

²⁸ *VON HOFFMAN v. QUINCY*, 4 Wall. 535, 18 L.Ed. 403, *Black's Cas. Constitutional Law*, 2d, 551.

²⁹ *Perry v. Town of Samson, D.C.*,

11 F.2d 655; *City of Ft. Madison v. Ft. Madison Water Co.*, 8 Cir., 134 F. 214.

³⁰ *Crummer v. Fort Pierce, D.C.*, 2 F.Supp. 737.

³¹ *Wall v. McNee*, 5 Cir., 87 F.2d 768; *Conter v. State ex rel. Bereznier*, 211 Ind. 659, 8 N.E.2d 75; *In re Cranberry Creek Drainage District*,

islation diverting to other uses revenues required by the bond contract to be used for the proper servicing of the bonds, or reducing the amount of such revenues, constitutes an invalid impairment of the obligation of those bonds.³² The same principles are applicable whether the duty to tax is specific and express or general and implied.³³ The test that determines that the subsequent legislation violates the contract clause is that it limits the taxing power in such manner and to such extent as to prevent the payment of the public bonds and other contractual obligations when due.³⁴ The duty to continue to levy taxes continues until the bonds or other valid debts have been paid, and the mere fact that taxes have once been collected to pay them does not relieve the public if the proceeds have not been applied to the discharge of the debts.³⁵ The duty to levy taxes is, however, subject to any limitations thereon that were coupled with the power to contract under the law in existence at the time when the contract was made, and, if that specified particular tax sources only, the only obligation is to employ those sources.³⁶ It should be noted that, where the duty to tax is general rather than specific, questions may arise as to just what taxes leviable by the public debtor at the time the contract was made or thereafter are within its implied promise to use its taxing power to discharge the obligation of such contract. The duty to levy the requisite taxes is usually enforceable by mandamus, but the courts themselves have no power to levy them.³⁷

202 Wis. 64, 231 N.W. 588, 85 A.L.R. 242.

³² *Islais Co., Ltd. v. Matheson*, 3 Cal.2d 657, 45 P.2d 326 (Subsequent statute reducing delinquency interest and penalties which were required to be put in a special fund to meet the obligations on the bonds held invalid); *Straughn v. Berry*, 179 Okl. 364, 65 P.2d 1203 (Same); *Moore v. Otis*, 8 Cir., 275 F. 747 (Subsequent statute in effect diverting to school purposes the proceeds of tax sales required to be used to pay bonds held invalid); *Hubbell v. Leonard*, D.C., 6 F.Supp. 145 (Subsequent statute diverting proceeds of automobile license and gasoline taxes to other purposes than the payment of bonds

for whose payment they had been pledged held invalid).

³³ *Ralls County Court v. United States*, 105 U.S. 733, 26 L.Ed. 1220.

³⁴ *Wolff v. New Orleans*, 103 U.S. 358, 26 L.Ed. 395.

³⁵ *State of Louisiana ex rel. Hubert v. City of New Orleans*, 215 U.S. 170, 30 S.Ct. 40, 54 L.Ed. 144.

³⁶ *United States ex rel. Huidekoper v. County Court of Macon County*, 99 U.S. 582, 589, 25 L.Ed. 331.

³⁷ *Rees v. City of Watertown*, 19 Wall. 107, 22 L.Ed. 72; *Yost v. Dallas County*, 236 U.S. 50, 35 S.Ct. 285, 59 L.Ed. 460.

The methods adopted to defeat the just claims of municipal creditors have at times included the legislative abolition of the debtor municipality with or without the creation of a new municipal corporation including all or a part of the territory situated within the limits of the former. It has, however, been decided that the power of a state to alter or destroy its municipal corporations may not be so exercised as to impair the obligation of existing contracts, and that the successor corporation or corporations become liable thereon.³⁸ The exigencies of the recent depression have produced decisions sustaining reasonable moratory legislation postponing the claims of private creditors against private debtors, and the considerations relied upon to sustain such legislation require similar decisions with respect to the validity of moratory laws affecting public bonds and other contractual obligations. It has been held not to violate the contract clause to suspend the remedies available under the law in force when the bonds were issued during the life of a state commission created under a subsequent statute for the purpose of reorganizing the debts of financially embarrassed municipalities, but the court recognized that the statute would become constitutionally unenforceable upon the cessation of the emergency that justified and sustained its enactment.³⁹ Subsequent legislation affecting the remedy for the enforcement of public bonds is, however, invalid if its effect is the practical destruction of their value. A relatively recent case effectively illustrates that principle. The bonds of a special assessment district had been issued under the provisions of a statutory plan requiring the assessments to be paid within 30 days after they became due, imposed a penalty for failure, provided for immediate foreclosure of the assessment lien by a sale on 20 days notice if the judgment was not paid within 10 days after it was rendered, gave the purchaser at the sale the right to immediate possession of the land, and gave appeals from the judgment a preferred status. A subsequently enacted statute increased the period that had to intervene between delinquency and the bringing of foreclosure

³⁸ *Mount Pleasant v. Beckwith*, 100 U.S. 514, 25 L.Ed. 699; *Mobile v. Watson*, 116 U.S. 289, 6 S.Ct. 398, 29 L.Ed. 620; *Graham v. Folsom*, 200 U.S. 248, 26 S.Ct. 245, 50 L.Ed. 464. For a discussion of what municipal property may be applied to satisfy its debts, see *Meriwether v. Garrett*, 102 U.S. 472, 26 L.Ed. 197.

³⁹ *Hourigan v. North Bergen Township in Hudson County*, 113 N.J.L. 143, 172 A. 193, 785. No decisions have been found involving either purely private or public debts determining whether the period of delay may constitutionally extend over the whole period of an extended depression.

proceedings, reduced the penalties, and permitted the owner to remain in possession after judgment and sale during a greatly extended period of redemption with no duty to account for his use thereof. This modification in remedy was held to take away from the debtor every incentive to fulfill his agreement, and to amount to an unnecessary and oppressive destruction of the incidents that gave the collateral security of the bonds its value. The contract clause was held violated thereby, and the trustee for the bondholders held entitled to relief measured by the law in force when the bonds were issued.⁴⁰

PUBLIC GRANTS

270. Public grants to private persons of public property and of special privileges and franchises are contracts within the purview of the contract clause. They are, however, construed strictly against the grantee and in favor of the public. They may be condemned by a state under its power of eminent domain, and the exercise by the grantees of the privileges and franchises conferred upon them may be regulated by a state under its police power.

The doctrine that public grants made by a state's legislature or by its authority are contracts within the purview of the contract clause was established at an early date in a case involving a legislative grant of sections of the state's public domain. The grant was held to imply a contract that the grantor would not reassert its title.⁴¹ The principal field in which this doctrine has been applied has been that involving the grant of special privileges and franchises to private persons. The power of a state to make such grants, and to give them the character of contracts, is not in the least affected by the contract clause, which is concerned only with protecting them, so far as they are

⁴⁰ *Worthen Co. ex rel. Board of Com'rs of Street Imp. Dist. No. 513 of Little Rock v. Kavanaugh*, 295 U.S. 56, 55 S.Ct. 555, 79 L.Ed. 1298, 97 A.L.R. 965.

⁴¹ *FLETCHER v. PECK*, 6 Cranch 87, 3 L.Ed. 162, Black's Cas. Constitutional Law, 2d, 528. Compare with *Fletcher v. Peck* the case of *Illinois Cent. R. Co. v. Illinois*, 146

U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018, holding that a legislative grant of the state's title to submerged lands under Lake Michigan was not invalidly impaired by subsequent legislation repealing it because the lands in question were held by the state in trust for the public use, which trust the state was incapable of abdicating.

contracts, against impairment by subsequent legislation.⁴² The limits on particular organs of a state's government, or on its other agencies and instrumentalities, to make such contracts are to be found only in a state's constitution and statutes, except that there has been developed a doctrine that a state itself is limited in bargaining away its police power and is wholly incapable of contracting away its power of eminent domain.⁴³ The majority of cases involving the position of such grants under the contract clause have either assumed that they constituted contracts or held that to be the fact. The issues in them have generally been what were the terms of the contracts and whether the subsequent legislation impaired their obligation as defined by those terms. The principal controversy relating to their terms has usually been concerned with the degree of protection accorded the private party thereto against competition. The principle against a state bargaining away its police power has not prevented judicial recognition of a state's power to grant private persons monopolistic franchises of limited duration to conduct public utilities and other businesses.⁴⁴ The courts have, however, made effective use of the principle that public grants are to be strictly construed against the grantee to limit the cases in which the grants are held to confer a monopoly.⁴⁵ The grant by a city of a thirty-year franchise to supply it and its inhabitants with water does not confer an immunity from competition by the city itself although the franchise provided that the city would grant no other person a like franchise during the life

⁴² *Proprietors of Bridges v. Hoboken Land & Improvement Co.*, 1 Wall. 116, 17 L.Ed. 571.

⁴³ *Stone v. Mississippi*, 101 U.S. 814, 25 L.Ed. 1079; *Butchers' Union Slaughter House & L. S. L. Co. v. Crescent City L. S. L. & Slaughter House Co.*, 111 U.S. 746, 4 S.Ct. 652, 28 L.Ed. 585; *Long Island Water Supply Co. v. Brooklyn*, 166 U.S. 685, 17 S.Ct. 718, 41 L.Ed. 1165.

⁴⁴ *NEW ORLEANS GASLIGHT CO. v. LOUISIANA LIGHT & HEAT PRODUCING & MFG. CO.*, 115 U.S. 650, 6 S.Ct. 252, 29 L.Ed. 516, *Black's Cas. Constitutional Law*, 2d, 532; *Butchers' Union Slaughter House & L. S. L. Co. v. Crescent City L. S. L.*

& Slaughter House Co., 111 U.S. 746, 4 S.Ct. 652, 28 L.Ed. 585.

⁴⁵ *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L.Ed. 773 (holding that the subsequent grant to one company of the right to construct a bridge over the Charles River, which bridge was to become a "free" bridge after a limited number of years, did not impair the obligation of a prior grant of a right to construct a toll bridge across that river, even though the practical effect of the grant of the later privilege would destroy the value of the earlier franchise whose terms contained no express provision protecting the grantee against competition).

of the grant.⁴⁶ Hence the construction of a municipal plant under subsequent legislative authority involved no violation of the contract clause. The grant of an "exclusive franchise" has, however, been held to forbid competition by the grantor city itself.⁴⁷ There is another class of cases in which the scope of a grant of exclusive privileges was strictly limited to protecting the grantee against only such competition as would result from granting another a privilege of engaging in the very same activity provided for in the former grant. Thus the grant of an exclusive bridge franchise does not protect the grantee against competition made possible by the grant of a privilege of constructing a railroad bridge over the same river in close proximity to the bridge constructed under the former grant,⁴⁸ and the grant of an exclusive ferry franchise is not invalidly impaired by the subsequent grant of a franchise to operate a bridge over the same river in inevitable competition with the ferry.⁴⁹ The special franchises granted local public utilities have usually been limited in duration. The use of the system of indeterminate permits as a device for the control of such utilities began while many unexpired franchises remained in existence. The question of the validity under the contract clause of applying to such unexpired franchises the system of indeterminate permits provided for by legislation enacted subsequent to the grant of such franchises has been passed on by the federal Supreme Court. The state court had construed a constitutional reservation of a power to amend or repeal all general and special laws, which was in force at the time the city had granted the utility its charter, as permitting the substitution of an indeterminate permit for the rights acquired by the utility under its franchise contract. This position was reversed by the Supreme Court of the United States. The specific issue was whether the method provided by the franchise for ascertaining the price at which the city was entitled to take over the property had been superseded by a wholly different method provided for by the "indeterminate permit" statute, but the theory on which the Court held the franchise terms to govern that matter would equally require a holding that the later statute could not validly transform a

⁴⁶ *Knoxville Water Co. v. Knoxville*, 200 U.S. 22, 26 S.Ct. 224, 50 L.Ed. 353.

⁴⁷ *Vicksburg v. Vicksburg Waterworks Co.*, 202 U.S. 453, 26 S.Ct. 660, 50 L.Ed. 1102, 6 Ann.Cas. 253.

⁴⁸ *Proprietors of Bridges v. Hoboken Land & Improvement Co.*, 1 Wall. 116, 17 L.Ed. 571.

⁴⁹ *Larson v. State of South Dakota*, 278 U.S. 429, 49 S.Ct. 196, 73 L.Ed. 441.

franchise for a definite term of years into one for an indeterminate period without the utility's consent.⁵⁰ Such fundamental changes in prior valid contracts are not justified by the reasonable necessities of adequate public regulation.

The statutes and ordinances conferring special franchises, including legislation creating private corporations, frequently contain provisions granting general powers or prescribing particular regulations for the grantee's conduct of the business authorized to be carried on under the franchises or charters. These are sometimes held not to constitute a part of the contract, particularly when their subject matter lies within the state's general police power. They are never deemed contractual in character if they concern matters with respect to which the legislature is prohibited from bargaining away its police power.⁵¹ Such provisions are, however, sometimes deemed contractual in character, and thus protected against impairment by subsequent legislation. The provisions of a special franchise authorizing the grantee railroad company to double track its line on a public street has been held a contractual grant impaired by a subsequent ordinance repealing it.⁵² The need to determine whether provisions of the types referred to above are or are not contractual in character has often been obviated by justifying subsequent legislative changes on the basis of an expressly reserved power to amend or repeal franchises or charters or on the basis of the general reservation of the power to affect prior contracts by reasonable exercises of a state's police power. The former of these bases has been successfully invoked to impose on a bridge company the duty of providing facilities for vehicular and pedestrian traffic over its bridge though no such obligation was imposed by its original charter,⁵³ to impose on a street railway company a more onerous burden in connection with maintaining the streets over which its lines operated than that provided by the franchise,⁵⁴ and to subject a corporation to methods of

⁵⁰ *Superior Water, Light & Power Co. v. City of Superior*, 263 U.S. 125, 44 S.Ct. 82, 68 L.Ed. 204.

⁵¹ *Texas & N. O. R. Co. v. Miller*, 221 U.S. 403, 31 S.Ct. 534, 55 L.Ed. 789 (holding that a charter provision relieving a railroad company from liability to its employees, even when the injury was due to its negligence, could not be given a contractual character by legislative action).

⁵² *Grand Trunk Western R. Co. v. City of South Bend*, 227 U.S. 544, 33 S.Ct. 303, 57 L.Ed. 633, 44 L.R.A., N.S., 405.

⁵³ *International Bridge Co. v. People of State of New York*, 254 U.S. 126, 41 S.Ct. 56, 65 L.Ed. 176.

⁵⁴ *Sioux City Street Ry. Co. v. Sioux City*, 138 U.S. 98, 11 S.Ct. 226, 34 L.Ed. 898.

regulation not in existence when it accepted its charter.⁵⁵ The latter of these bases has been relied upon to validate the repeal of a franchise provision authorizing a street railway to construct a double track line,⁵⁶ and to regulate the rates of a railroad whose charter empowered it to fix and regulate the tolls chargeable by it.⁵⁷ The application of these principles has protected the public interest against the injury that it might otherwise have had to endure as a result of the activities of state legislative bodies and interested private parties during eras of industrial expansion and rapid economic growth. It is generally held that the special privileges and franchises contained in public grants are transferable, and pass under statutory powers conferred upon the grantees to transfer their property and effects.⁵⁸ If, however, a franchise, granted at a time when the existing law reserves no power to amend or repeal them, is subsequently transferred at a time when the law contains such a reservation of power, it becomes as subject to that reserved power as it would have been had such legal provision existed at the time it was granted.⁵⁹ The only effective measure for protecting the public against the consequences of its prior contractual obligations in cases in which their modification or repeal cannot be justified as an exercise of an express or implied reserved power to do so is by condemning the contract under the power of eminent domain. This may always be done upon payment of fair compensation since the courts have declined to permit one legislature to bind a subsequent legislature by a contract not to exercise that power.⁶⁰

⁵⁵ *Suydam v. Moore*, 8 Barb. N.Y., 358.

⁵⁶ *Baltimore v. Baltimore Trust & G. Co.*, 166 U.S. 673, 17 S.Ct. 696, 41 L.Ed. 1160.

⁵⁷ *Railroad Commission Cases*, 116 U.S. 307, 6 S.Ct. 334, 388, 1191, 29 L.Ed. 636.

⁵⁸ *City of Owensboro v. Cumberland Telephone & Telegraph Co.*, 230 U.S. 58, 33 S.Ct. 988, 57 L.Ed. 1389.

⁵⁹ *Shields v. Ohio*, 95 U.S. 319, 24 L.Ed. 357.

⁶⁰ *Contributors to Pennsylvania Hospital v. City of Philadelphia*, 245 U.S. 20, 38 S.Ct. 35, 62 L.Ed. 124.

CONTRACTUAL EXEMPTION FROM TAXATION

271. A contract under which a state grants an immunity from taxation is protected by the contract clause. The grant of such contractual immunity is construed strictly against the grantee and in favor of the public. The immunity is generally construed as a non-transferable personal privilege of the grantee.
272. The Supreme Court of the United States has not developed a doctrine that a state may not bargain away its taxing power. The constitutions of some of the states specifically prohibit legislative grants of immunity from taxation.

The principles developed by the courts to limit a state in contracting away its police power and its power of eminent domain have not been extended to its taxing power. The power of a state to limit its exercise of its taxing power by a contract protected against impairment by the contract clause was impliedly recognized in an early case in which, however, the Court held it not to have done so.⁶¹ It was definitely established by a subsequent decision in which the power was deduced from the inherent sovereignty of the state, through its legislature, to select the objects of taxation.⁶² The immunity of the public securities of a state and its political subdivisions from taxation under subsequent legislation of such state represents an important form of contractual exemption from taxation. The problems that have arisen in connection therewith have been considered in the earlier discussion of the status of public bonds under the contract clause. The majority of the other cases that have dealt with the problem of contracts limiting a state's taxing power have involved legislative grants of tax immunity that have frequently been contained in the charters under which the grantees were organized. Such grants have either specifically conferred an immunity from specified forms of taxation, or have provided for a prescribed method of taxing the grantees or their property which was made in lieu of other methods of taxing them. The grants contained in charters creating corporations organized for non-business purposes have usually been of the former type, while those found in the charters of corporations organized for profit have generally

⁶¹ *Providence Bank v. Billing*, 4 Pet. 514, 7 L.Ed. 939.

BANK v. KNOOP, 16 How. 369, 14 L.Ed. 977, Black's Cas. Constitutional Law, 2d, 548.

⁶² PIQUA BRANCH OF STATE

been of the latter type. The existence of any immunity whatever, and its extent where some immunity is conferred, are matters of the construction of the terms of the grant. The courts generally construe the legislation on which the immunity is alleged to be based strictly against the grantee in determining both of these issues.⁶³ A broad construction has been adopted only in defining the scope of exemptions conferred upon charitable and educational institutions.⁶⁴ The mere enactment of a statute exempting the property of an existing educational institution from taxation has, however, been held not to establish a contractual immunity from taxation, because of the absence of any consideration to support it.⁶⁵ The principle of the strict construction of grants of tax immunity has had an important application in the rule that such grants are personal privileges of the grantees which are not assignable by their voluntary acts,⁶⁶ and do not pass to their successors acquiring their property and franchises by a judicial sale.⁶⁷ There is, however, nothing in the federal Constitution that prevents a state from making an immunity from taxation appurtenant to the property covered by the original grant of such immunity, and, if the state's contract is of that character, the privilege passes with the transfer of such

⁶³ *PIQUA BRANCH OF STATE BANK v. KNOOP*, 16 How. 369, 14 L.Ed. 977, Black's Cas. Constitutional Law, 2d, 548; *Ford v. Delta & Pine Land Co.*, 164 U.S. 662, 17 S.Ct. 230, 41 L.Ed. 590. For a case in which the Supreme Court clearly departed from this principle in finding a contract limiting a state's power to tax, see *American Smelting & Ref. Co. v. Colorado ex rel. Lindsley*, 204 U.S. 103, 27 S.Ct. 198, 51 L.Ed. 393, 9 Ann.Cas. 978. The Smelting Company, a foreign corporation, was admitted to do a local business in Colorado at a time when the statute provided that, on the payment of the required fee, it should be subject to all the liabilities, restrictions and duties that were or might be imposed upon domestic corporations of like character. This was held to constitute a contract that the Company should not be taxed at a greater rate than domestic corporations of the same character which was impaired

by a subsequent statute imposing an annual license tax upon it at double the rates applicable to similar domestic corporations.

⁶⁴ *Northwestern University v. People of Illinois ex rel. Miller*, 99 U.S. 309, 25 L.Ed. 387.

⁶⁵ *Seton Hall College v. South Orange*, 242 U.S. 100, 37 S.Ct. 54, 61 L.Ed. 170.

⁶⁶ *Morgan v. Louisiana*, 93 U.S. 217, 23 L.Ed. 860; *Rochester Ry. Co. v. Rochester*, 205 U.S. 236, 27 S.Ct. 469, 51 L.Ed. 784; *Chesapeake & O. R. Co. v. Miller*, 114 U.S. 176, 5 S.Ct. 813, 29 L.Ed. 121; *Phoenix Fire & Marine Ins. Co. v. Tennessee use of Memphis*, 161 U.S. 174, 16 S.Ct. 471, 40 L.Ed. 660.

⁶⁷ *Mercantile Bank v. Tennessee use of Memphis*, 161 U.S. 161, 16 S.Ct. 461, 40 L.Ed. 656.

property or any part thereof.⁶⁸ In line with the same principle of strict construction it has been held that a contract exempting certain lands from taxation prevented only the taxation of the grantee's interest therein, and that subsequent legislation taxing the interests of the lessees of such lands did not invalidly impair the obligation of the original grant.⁶⁹ Nor does an exemption from taxes include an immunity from special assessments.⁷⁰ A contractual immunity from taxation cannot arise if the state legislature is prohibited by the state's constitution from bargaining away the state's taxing power.⁷¹ The extent of the protection accorded by the contract clause to grants of tax immunity has also been reduced by the "reserved power" doctrine. If the law in force when the grantee claims to have acquired his immunity by legislative grant has reserved the power to amend or repeal corporate charters or other legislative grants of special privileges, the grant of immunity may be modified or completely taken away at any time by subsequent legislative act.⁷² The subsequent legislation is in such case in complete accord with the terms of the contract. This principle has been applied in defining the scope of the immunity of the assignee of the original grantee thereof where the law in force at the time of the assignment contained such reserved power although that in force when the grant had been originally made did not.⁷³ The grants involved in all of the cases thus far considered were made by the state. The same principles govern those made by the subordinate political sub-

⁶⁸ *Wright v. Central of Georgia Ry. Co.*, 236 U.S. 674, 35 S.Ct. 471, 59 L.Ed. 781; *New Jersey v. Wilson*, 7 Cranch 164, 3 L.Ed. 303. The exemption protected in the case last cited was held lost by acquiescence in the taxation of the lands covered by it during a period of sixty years by invoking a conclusive presumption of its surrender. *Given v. Wright*, 117 U.S. 648, 6 S.Ct. 907, 29 L.Ed. 1021.

⁶⁹ *Jetton v. University of the South*, 208 U.S. 489, 28 S.Ct. 375, 52 L.Ed. 584. See, also, *People of State of New York ex rel. Clyde v. Gilchrist*, 262 U.S. 94, 43 S.Ct. 501, 67 L.Ed. 883 (holding that a provision in a mortgage recording tax act exempting the mortgage and the debt secured thereby from other state and local taxes, even if construed as con-

ferring a contract exemption, did not exempt the interest on the loan from state income taxation).

⁷⁰ *Illinois Cent. R. Co. v. Decatur*, 147 U.S. 190, 13 S.Ct. 293, 37 L.Ed. 132.

⁷¹ *Great Northern Ry. Co. v. State of Minnesota*, 216 U.S. 206, 30 S.Ct. 344, 54 L.Ed. 446; *Chicago Great Western Ry. Co. v. State of Minnesota*, 216 U.S. 234, 30 S.Ct. 353, 54 L.Ed. 460.

⁷² *Covington v. Kentucky*, 173 U.S. 231, 19 S.Ct. 383, 43 L.Ed. 679; *Atlantic & Gulf Railroad Co. v. Georgia*, 98 U.S. 359, 25 L.Ed. 185.

⁷³ *Northern Cent. Ry. Co. v. Maryland*, 187 U.S. 258, 23 S.Ct. 62, 47 L.Ed. 167.

divisions of a state. Their power to make such grants must be found either in the state's constitution or in its valid legislation. The rule is that a municipality's power to grant a contractual exemption from taxation will not be construed to include the power to contract away the state's own power to tax for state purposes the tax objects to which the contract relates.⁷⁴ There is, however, nothing in the federal Constitution to prevent a state from conferring the power to so bind the state upon its subordinate political subdivisions. A contract exemption conferred by one state has no effect upon the power of another state to tax the property of the grantee of such immunity so far as that property has a taxable situs within the taxing state at the time the tax is imposed. The former state lacks the power to bind the legislative authorities of the latter state.

CORPORATE CHARTERS

273. The charter of a private corporation is a contract between the state and the corporation. The grant of the privilege of corporate existence also creates a system of contractual relationships between the corporation and its shareholders and among the shareholders themselves.
274. All the foregoing contracts are protected by the contract clause against impairment of their respective obligations by subsequent legislative enactments of the state under whose laws the corporation was organized.
275. They are all subject to having their obligations affected by such subsequent legislation as can be justified as a reasonable exercise of that state's police power, or as an exercise by it of such power as it may have reserved to amend or repeal the corporate charter or the law under which the corporation was organized.
276. The reserved power is not unlimited, but there exists considerable conflict as to what subsequent legislation transcends the limits on its exercise, particularly in relation to the contract between the corporation and its shareholders and that among the shareholders themselves.

Corporate Charters as Contracts

The doctrine that the charter of a private corporation is a contract within the protection of the contract clause was first es-

⁷⁴ *Sioux City Street R. Co. v. Sioux City*, 138 U.S. 98, 11 S.Ct. 226, 34 L.Ed. 898.

published in the Dartmouth College Case.⁷⁵ The charter involved in that case had been granted by the Crown to the Trustees of Dartmouth College which had been established thereby as a self-perpetuating body corporate. The decision held that the act of the Crown in creating that corporate body was a contract between it, the Trustees and the original donors of the fund which was to be administered by the Trustees, the obligation of which was impaired by a subsequent New Hampshire statute which increased the number of the Trustees and subjected their actions to control and supervision by another board. The principles of this decision have been extended to include the charters of every private corporation organized and existing under state legislation regardless of the purposes for which it may have been organized. The creation of corporations by special legislative acts was practically the only method employed during the nation's early history. This is now prohibited by express provisions found in the constitutions of many of the states. Corporations today are almost invariably organized under general laws by action of the incorporators in accordance with the provisions of such statutes. The change in method has made it somewhat more difficult to determine the precise terms of the charter contract, but has not otherwise affected the character of the constitutional problems that have arisen in developing the implications of the doctrine that a charter is a contract. The grant of the privilege of corporate existence produces a complex system of legal relationships of which the relationship between the state and the newly organized corporate entity is but one. It also involves the creation of legal relations between that corporate entity and its shareholders, and among the shareholders themselves. All three of these separate relationships are not only consensual but contractual within the purview of the contract clause. The general principles heretofore discussed that define the limits imposed by that clause upon a state's power to affect prior contractual relations by subsequent legislative enactments apply equally to these contracts. No one of them is invalidly impaired if such later enactments constitute reasonable exercises of the police power. Any one of them is invalidly impaired thereby if such enactments are not sustainable on that basis unless they can be sustained under the "reserved power" doctrine. The principal special problems involving the validity under the contract clause of subsequent legislation affecting these several contracts have con-

⁷⁵ DARTMOUTH COLLEGE v. 629, Black's Cas. Constitutional Law, WOODWARD, 4 Wheat. 518, 4 L.Ed. 2d, 537.

cerned the extent to which it could be justified under that doctrine.

Reserved Power to Amend or Repeal Corporate Charters

The "reserved power" doctrine owes its origin to a suggestion of Mr. Justice Story in his concurring opinion in the Dartmouth College Case that the legislatures could retain a large measure of control over corporate charters if they inserted in the statutes granting such charters a provision reserving to themselves the power of their amendment and repeal since the subsequent exercise of those powers would then be in accordance with the contracts and could, therefore, not impair their obligation. The reservation of the power to amend or repeal may be contained in the very act that constitutes the corporate charter, or in the state constitution or legislation under which corporations are authorized to be formed. A reservation of power to amend the articles of incorporation subscribed to by the incorporators contained in the articles themselves is clearly a term in the contract binding the incorporators and their successors and subsequent new shareholders. Subsequent action by the shareholders in accordance therewith would involve no issue under the contract clause since it would not constitute legislation. Such an issue would arise only if subsequent legislation modified the prescribed method or deprived the shareholders of their power to act thereunder. A reservation of power may be either specific or general in its terms. The majority of the decisions have involved the scope of permissible legislative action under a general reservation of power whether contained in the act constituting the corporate charter, in the state's constitution, or in its statutes.

The reservation by a state of a power to amend or repeal a corporate charter clearly permits a state by subsequent legislation to alter or repeal the provisions of the contract that exists between it and the corporation. It is immaterial whether the reservation is a part of a special statute granting the charter or of the constitution or general statutes existing at the time a corporation is organized. It is also immaterial whether it reserves a power to amend or repeal corporate charters or a power to amend or repeal the legislation under which corporations may be organized. The amendment or repeal of the charter does not impair the obligation of the charter contract nor violate any other provision of the federal Constitution so far as it deprives the

corporation of its privilege of continuing to exist as such.⁷⁶ A previous discussion has already indicated that the same principle permits the abrogation of any special privileges or franchises whose grant may have constituted terms of the charter contract. The decided cases clearly sustain those positions, and the logic on which they are based is unimpeachable. However, a corporate charter invariably contains provisions defining the purposes for which the corporation is organized and specifying the general powers that it may exercise in promoting and carrying out those purposes. It is not always clear whether any or all of these provisions are to be deemed a part of the contract between the state and the corporation. They have generally assumed a more important role as elements in the contract between the corporation and its shareholders and that among the shareholders themselves. There are some of them that have been treated as elements in the contract between the state and the corporation, and as such subject to modification or repeal by an exercise of the reserved power. It has, for example, been held that such reservation justified an assertion of a state's power to fix railroad rates where the corporate charter was at least construed to have conferred the power to fix rates upon the corporation.⁷⁷ It has also been relied upon to sustain, as not invalidly impairing a charter provision authorizing the maintenance of a college for the education of white and colored pupils, a subsequent statute prohibiting their instruction at the same place and time.⁷⁸ The practical effect of the legislation involved in these cases was to destroy, for the time being at least, a power that had been conferred upon the affected corporations. The reserved power has also been held to validate subsequent legislation regulating the exercise of powers originally granted in the charter even though its effect was to impose burdens not provided for by the law in existence when the charters were obtained.⁷⁹ Its effect in all of the cases cited in the last three footnotes was merely to permit the state to exercise its police power to protect the public interest in a reasonable manner in regulating the activities of its creat-

⁷⁶ *Greenwood v. Union Freight R. Co.*, 105 U.S. 13, 26 L.Ed. 961.

⁷⁷ *Shields v. Ohio*, 95 U.S. 319, 24 L.Ed. 357.

⁷⁸ *Berea College v. Commonwealth of Kentucky*, 211 U.S. 45, 29 S.Ct. 33, 53 L.Ed. 81.

⁷⁹ *International Bridge Co. v. Peo-*

ple of State of New York, 254 U.S. 126, 41 S.Ct. 56, 65 L.Ed. 176 (sustaining a subsequent statute imposing duty to render services not contemplated in original charter); *Mayor, etc., of Worcester v. Norwich & W. R. R. Co.*, 109 Mass. 103 (sustaining subsequent statute requiring construction of union depot).

ures. The same results could be secured today without invoking the reserved power to amend or repeal by relying instead upon the doctrine that all contracts are made subject to being affected by reasonable exercises of a state's police power. It is doubtful that the legislative repeal of a charter without cause would be considered a valid exercise of the police power, and in that type of case at least the reserved power enables that to be done which would otherwise be invalid.

Limits on the Reserved Power

Courts have always taken the position that the reserved power was subject to certain rather vaguely defined limits.⁸⁰ The language of their opinions (frequently dictum) indicates clearly that such power furnishes no basis for subjecting corporations to regulation which, but for such power, would amount to depriving them of their property without due process of law or in other ways violating what would be their constitutional rights in the absence of such reservation.⁸¹ The particular point of present concern is whether the reserved power is limited in the sense that the contract clause itself can be held to be violated by legislative alterations of the contract between the state and the corporation in cases in which the power of amendment and repeal has been reserved by the state. There have been decisions holding that the reservation of that power will not prevent certain alterations in the charter contract from being invalid under the contract clause. It has been held not to justify the kind of changes which the Dartmouth College Case held invalid in the absence of such reserved power.⁸² It has been frequently stated, and sometimes decided, that the power may not be exercised to defeat the purposes for which corporate powers were granted, or to arbitrarily make alterations that are inconsistent with the scope and object of the charter.⁸³ This is the basis of such decisions as hold in-

⁸⁰ *Shields v. Ohio*, 95 U.S. 319, 24 L.Ed. 357 (dictum); *Holyoke Water-Power Co. v. Lyman*, 15 Wall. 500, 21 L.Ed. 133 (dictum); *Looker v. Maynard ex rel. Dusenbury*, 179 U.S. 46, 21 S.Ct. 21, 45 L.Ed. 79 (dictum); *Phillips Petroleum Co. v. Jenkins*, 297 U.S. 629, 56 S.Ct. 611, 80 L.Ed. 943 (dictum).

⁸¹ *Shields v. Ohio*, 95 U.S. 319, 24 L.Ed. 357 (dictum); *Holyoke Water-Power Co. v. Lyman*, 15 Wall. 500, 21

L.Ed. 133 (dictum); *Greenwood v. Union Freight R. Co.*, 105 U.S. 13, 26 L.Ed. 961 (dictum); *Woodward v. Central Vermont R. Co.*, 180 Mass. 599, 62 N.E. 1051; *People v. O'Brien*, 111 N.Y. 1, 18 N.E. 692, 2 L.R.A. 255, 7 Am.St.Rep. 684.

⁸² *Ohio ex rel. v. Neff*, 52 Ohio St. 375, 40 N.E. 720; *City of Louisville v. President, etc., of University of Louisville*, 15 B.Mon., Ky., 642.

⁸³ *Phillips Petroleum Co. v. Jen-*

valid subsequent legislation effecting a fundamental change in the character of the corporate enterprise insofar as that involves a change in the contract between the state and the corporation.⁸⁴ It is, however, universally recognized that the reserved power renders immune to objections, based on the contract clause, such subsequent legislative alterations as tend to carry into effect the original purposes of the charter grant or to protect the rights of the corporation and the public interests.⁸⁵ There exists no complete judicial unanimity as to what specific alterations satisfy these tests of validity and invalidity.

The Reserved Power and the Contract Between the Corporation and Its Shareholders

The extent to which the reserved power to amend or repeal corporate charters, or the statutes under which corporations may be organized, permits subsequent legislation affecting the contract between the corporation and its shareholders and that among the shareholders themselves is a matter on which there exists considerable difference of judicial opinion and decision. The state itself is not a party to these contracts, although some at least of the provisions of the legislation under which the corporation is created constitute terms of those contracts. The legal position of these contracts in relation to the contract clause is no different from that occupied by any other contracts between private persons. They are as liable to be affected by subsequent enactments constituting reasonable exercises of the police power as are other contracts. The reserved power need be relied upon to sustain subsequent legislation affecting them only where it cannot be justified as a reasonable exercise of the police power. It is in fact invoked and relied upon in many instances in which the latter principle would produce the same result, and, whether absolutely essential or not, constitutes a legal device actually employed by the courts in defining the limits imposed by the contract clause upon the state in regulating the affairs of private corporations. Some of its important applications in this field require consideration.

The problems involving these issues may arise either because the subsequent legislation itself effects an alteration of those con-

kings, 297 U.S. 629, 56 S.Ct. 611, 80 L. Ed. 943 (dictum).

⁸⁴ Zabriskie v. Hackensack & N. Y. R. R. Co., 18 N.J.Eq. 178, 90 Am.Dec. 617.

⁸⁵ Holyoke Water-Power Co. v. Lyman, 15 Wall. 500, 21 L.Ed. 133 (dictum); Looker v. Maynard ex rel. Dusenbury, 179 U.S. 46, 21 S.Ct. 21, 45 L.Ed. 79 (dictum).

tracts or because it authorizes such alterations to be effected by corporate action other than that required under the law in force when the contracts arose.⁸⁶ The decisions generally ignore this difference as a factor although it is conceivable that legislation of the former type might be held reasonable under circumstances in which legislation of the latter type would not be so held. This would affect the problem of the scope of the reserved power insofar as the reasonableness of its exercise is a factor in its solution.⁸⁷ The specification of the purposes for which the corporation is organized is an important element in the contract between the corporation and its shareholders and that among the shareholders. The reserved power to amend permits subsequent legislation authorizing corporate purposes to be changed within limits by corporate action by which the change could not have been effected under the law in force when it was incorporated and the contracts under discussion arose.⁸⁸ The limits of permissible changes in corporate purposes are usually indicated by the vague formula that fundamental changes therein may not be forced on dissenting shareholders by methods not authorized by the law in force at the time of incorporation.⁸⁹ The limit has been held not to be exceeded by subsequent legislation that permitted the charters of insurance corporations doing business on the assessment plan to be amended to convert such corporations into companies operating on a mutual level premium plan by the sole action of the directors without the consent of the members.⁹⁰ However, the reserved power has been held not to validate legislation authorizing the conversion of a mutual insurance company into a stock company against the will of the

⁸⁶ The time when the contracts arose seems in most cases to have been the time of the organization of the corporation. No case has been found discussing the problem whether the decisive time may not be some other moment of time in the case of some shareholders.

⁸⁷ That it is such factor has at times been asserted; see *Shields v. Ohio*, 95 U.S. 319, 24 L.Ed. 357.

⁸⁸ *Buffalo & N. Y. City R. Co. v. Dudley*, 14 N.Y. 336 (change in corporate purpose by changing termini of the railroad for whose construction the corporation was organized); *White v. Syracuse & Utica R. R.*

Co., 14 Barb., N.Y., 559 (sustaining statute authorizing sale of road and reinvestment of proceeds in another road by less than the unanimous vote of shareholders which was required under law in force at time of organization); contra to first case, *Zabriskie v. Hackensack & N. Y. R. Co.*, 18 N.J.Eq. 178, 90 Am.Dec. 617.

⁸⁹ *Zabriskie v. Hackensack & N. Y. R. Co.*, 18 N.J.Eq. 178, 90 Am.Dec. 617; see also dictum in *Phillips Petroleum Co. v. Jenkins*, 297 U.S. 629, 56 S.Ct. 611, 80 L.Ed. 943.

⁹⁰ *Polk v. Mutual Reserve Fund Life Ass'n of New York*, 207 U.S. 310, 28 S.Ct. 65, 52 L.Ed. 222.

policy holders.⁹¹ Subsequent legislation authorizing the sale of all the corporate assets, or permitting corporate consolidations and mergers, by action of a lesser proportion of the shares than required under the law in force when the corporation was organized have been sustained as proper exercises of the reserved power.⁹² The fact that some of these statutes made provision for purchasing the shares of dissenting shareholders at a fair price was a factor relied on by some of the courts in reaching their decisions.⁹³ The effect of permitting such changes as considered in this paragraph is to sacrifice the rights of dissenting shareholders, as conceived by themselves, to promote the private interests of the majority group. It frequently involves social advantages through removing rigidities in corporate organization that may impede economic developments and give unreasonable minorities unfair advantages.

The direction of corporate affairs is vested in the board of directors. The question has frequently arisen as to how far subsequent legislation may alter the rights of shareholders to elect directors as defined by the law in force at the time the corporation was organized. Such changes invariably affect the degree of control exercisable by the individual shareholder, or by groups of shareholders, in the ultimate control of the corporate management. They, therefore, involve substantial and vital interests. Such legislation has sometimes conferred upon a given shareholder the right to select or appoint a number of directors in excess of those to which he was originally entitled. This has been held not to impair the obligation of the prior charter contract where the state had reserved a general power of amendment of corporate charters.⁹⁴ The benefitted shareholder in each of the cases cited was a municipality, and the circumstances in which the changes occurred made the subsequent legislation eminently just and reasonable. The other principal problem has

⁹¹ *Schwarzwaelder v. German Mut. Fire Ins. Co.*, 59 N.J.Eq. 589, 44 A. 769.

⁹² *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 P. 225 (merger); *Bingham v. Savings Inv. & Trust Co. of East Orange*, 102 N.J.Eq. 302, 140 A. 321 (merger); *White v. Syracuse & Utica R. R. Co.*, 14 Barb., N.Y., 559 (sale and reinvestment of proceeds); *Allen v. Ajax Mining Co.*, 30 Mont. 490, 77 P. 47 (sale). Contra,

Kenosha, Rockford & R. I. R. Co. v. Marsh, 17 Wis. 13 (merger); *Dow v. Northern R. R. Co.*, 67 N.H. 1, 36 A. 510 (lease of road for 99 years).

⁹³ See *Bingham v. Savings Inv. & Trust Co. of East Orange*, 102 N.J.Eq. 302, 140 A. 321.

⁹⁴ *Miller v. State of New York*, 15 Wall. 478, 21 L.Ed. 98; *New Haven & Denby R. R. Co. v. Chapman*, 38 Conn. 56.

involved the validity of subsequent legislation altering the voting methods available to shareholders in the selection of directors. The contract clause prevents the legislature, in the absence of a reserved power to amend corporate charters, from authorizing a majority of the shareholders to substitute cumulative voting in the election of directors for the non-cumulative system against the dissent of the minority.⁹⁵ The decisions are practically unanimous that the reserved power may be exercised to effect such a change and confer the privilege of cumulative voting in the election of directors against the will of the minority, and that such legislation does not impair the obligation of the minority's contracts with the corporation and the assenting shareholders.⁹⁶ It has, however, been held not to validate subsequent legislation authorizing corporate action to abolish the right of cumulative voting against a dissenting minority.⁹⁷ The reservation of the power of amendment apparently permits a more extensive interference with the voting rights of the members of a charitable corporation than would be valid in the case of the voting rights of shareholders in other classes of corporations. A statute that abolished the voting rights of the members of a charitable corporation and converted the board of trustees into a self-perpetuating body does not violate the contract clause where the legislature has reserved the power to amend corporate charters.⁹⁸ The member's voting right was held to possess no substantial value and to be such that it had to yield, under the reserved power, to the greater right of the state and the corporation to provide for a more efficient administration of the corporate affairs. A much less drastic change in the voting rights of another non-profit corporation under authority of legislation enacted after the corporation was organized has, however, been held not to be justified as a valid exercise of the reserved power by the court of a state that had favored a narrow construction of the scope of that power.⁹⁹ It is practically certain that that power

⁹⁵ *State ex rel. Haeussler v. Greer*, 78 Mo. 188; *Baker's Appeal*, 109 Pa. 461.

⁹⁶ *Looker v. Maynard ex rel. Dusenbury*, 179 U.S. 46, 21 S.Ct. 21, 45 L.Ed. 79; *Gregg v. Granby Mining & Smelting Co.*, 164 Mo. 616, 65 S.W. 312.

⁹⁷ *Loewenthal v. Rubber Reclaiming Co.*, 52 N.J.Eq. 440, 28 A. 454.

⁹⁸ *In re Mt. Sinai Hospital*, 250 N. Y. 103, 164 N.E. 871, 62 A.L.R. 564.

⁹⁹ *In re Newark Library Ass'n*, 64 N.J.L. 217, 43 A. 435 (the statute held invalid gave each shareholder one vote for each share held by him whereas the statute under which the corporation was organized gave each shareholder one vote for each share held not in excess of five and one vote for each additional five shares).

could not be employed to validate legislation, enacted after a business corporation was organized, under which shareholders could be completely deprived of voting rights formerly appurtenant to their shares. The changes permitting cumulative voting have often been supported by reason of their tendency to protect minority interests.

The Reserved Power and the Contract Among Shareholders

The relative rights of shareholders of the same class, or of shareholders of different classes, in the corporate assets and income are governed by the contract existing among the shareholders of which the relevant provisions of the law under which the corporation is organized constitute some of the terms. The legislature does not usually interpose directly to modify the contract among the shareholders in respect of these matters, although there have been cases in which it has sought to do so. It more frequently enacts legislation whose effect is to permit changes in such contract to be made by corporate action by methods other than those in force when the contract arose. The power of the state to validly affect such contract by reasonable exercises of its police power has been sustained and could not well be denied, although the public interest that would validate such legislation would have to be a weighty one.¹ The usual basis on which the validity of such legislation has been sought to be sustained is that it is a valid exercise of the reserved power to amend corporate charters or the law under which corporations may be organized. Legislation enacted after a corporation was organized which authorized the amendment of corporate charters to permit the issuance of preferred stock, and the conversion of common into preferred stock, against the will of the minority, has been sustained as a valid exercise of a reserved power to amend although it effected a material alteration of the shareholder's rights as defined by the law in force when the corporation was organized.² The reserved power has also been invoked to sustain subsequent legislation authorizing amendment

¹ *Bucsi v. Longworth Bldg. & Loan Ass'n*, 119 N.J.L. 120, 194 A. 857 (sustaining a statute materially changing the rules under which members of a building and loan association could withdraw, and limiting their right to sue to recover sums due them on such withdrawal; it was justified largely on the theory that it ef-

fected a more equitable participation in such corporations' available assets and that it was a reasonable means for preventing their insolvency).

² *Wasson v. Planters' Bank & Trust Co.*, 188 Ark. 343, 65 S.W.2d 528, 90 A.L.R. 141.

of the corporate charter depriving certain classes of shares of redemption rights,³ but the contrary view has also been asserted.⁴ The reserved power, however, furnishes no basis for validating subsequent legislation permitting a corporation to amend its charter without the unanimous consent of the shareholders with respect to matters which required unanimous consent under the law in existence when the corporation was organized. The basis of the decision was not that such expansion would invariably violate the contract clause, but that the vaguely defined limits on the scope of the reserved power with respect to that matter had been exceeded by the statute in issue which had permitted the amendment of the corporate charter so as to deprive preferred stock of its right to accrued unpaid cumulative dividends without the assent of the affected stock.⁵ It has also been held that the reserved power does not validate subsequent legislation permitting the amendment of corporate charters so as to deprive preferred shareholders without their assent of their contract right to require the corporation to accumulate a sinking fund for the retirement of the preferred stock.⁶ The problem in the last two cases cited involved the validity of a statute amending that provision of the law, in force when the corporations were organized, that defined the extent to which, and the manner in which, corporate charters could be amended by action of the shareholders, where the law also reserved a power to amend the statutes relating to incorporations. It is always necessary where the problem arises in this form to first determine whether the charter amendment was within the scope of the provisions relating to its amendment by corporate action as that provision existed when the corporation was organized.⁷ An issue under the contract clause can arise only if that preliminary question is answered in the negative. The federal Supreme Court has also refused to permit the reserved power to be employed as the basis for sustaining direct legislative attempts to change the relative claims of withdrawing and remaining members of a solvent building and loan association to the disadvantage of the former where there existed no discernible public interest to justify such

³ Davis v. Louisville Gas & Electric Co., 16 Del.Ch. 157, 142 A. 654.

⁴ Breslav v. New York & Queens Electric Light & Power Co., 249 App. Div. 181, 291 N.Y.S. 932.

⁵ Keller v. Wilson & Co., Del.Sup., 190 A. 115.

⁶ Yoakam v. Providence Biltmore Hotel Co., D.C., 34 F.2d 533.

⁷ For case involving such problem of interpretation see Peters v. United States Mortg. Co., 13 Del.Ch. 11, 114 A. 598.

interference with existing contract rights.⁸ It also held that the change could not be justified as a reasonable exercise of the state's police power. The decisions indicate a reluctance on the part of the courts to permit the reserved power to be used as the basis for altering these vital and substantial elements in the contract among the shareholders or members of corporations except where the change is such that it could equally be justified as a reasonable exercise of a state's police power. It is in cases of this class that the desire to protect vested interests has operated to shape the applicable constitutional rules.

The limited liability of corporate shareholders is a logical implicate of the theory that a corporation is a legal entity distinct from its members. It is a privilege that is either expressly or impliedly conferred upon shareholders by the laws under which they are permitted to organize themselves into a body corporate. There exists some conflict as to how far the state may enlarge this liability by legislation enacted after the organization of the corporation. There are decisions holding that the contract clause is impaired by such legislation with respect to shares issued prior thereto,⁹ but not with respect to shares issued thereafter.¹⁰ A change in the character of the shareholder's liability by statute enacted after the organization of a corporation converting it from a secondary to a primary liability for the corporate debts has also been held invalid.¹¹ The opinions rendered in these cases made no reference to any reserved power to amend corporate charters or the legislation under which the corporations were organized. It is, however, the prevailing view that the imposition of additional liability upon the shareholders by legislation en-

⁸ *Treigle v. Acme Homestead Ass'n*, 297 U.S. 189, 56 S.Ct. 408, 80 L.Ed. 575, 101 A.L.R. 1284. A similar holding has been made where the subsequent legislation so altered the relations of borrowing and non-borrowing members as to shift the losses incurred in liquidation from the former to the latter group, *Fidelity Bldg. & Loan Ass'n v. Thompson*, Tex.Com.App., 45 S.W.2d 167. Cf. with case first cited that referred to in footnote 1.

⁹ *Haberlach v. Tillamook County Bank*, 134 Or. 279, 293 P. 927, 72 A.L.R. 1245; *Yoncalla State Bank v.*

Gemmill, 134 Minn. 334, 159 N.W. 798, L.R.A.1917A, 1223; *Dagg v. Hammons*, 34 Ariz. 445, 272 P. 643, 72 A.L.R. 1237. The contract clause protects the corporate creditor against legislative repeal of a stockholder's double liability in force when he became a creditor; *Hawthorne v. Calef*, 2 Wall. 10, 17 L.Ed. 776. The case did not involve an issue under the reserved power.

¹⁰ *Schramm v. Done*, 135 Or. 16, 293 P. 931.

¹¹ *Luikart v. Paine*, 126 Neb. 251, 253 N.W. 86.

acted after the corporation's organization does not violate the contract clause where the state has reserved the power of amendment.¹² The theory is that shareholders who subscribe to shares subject to that condition are deemed to have assumed the risk that their relation to the corporation may be altered to their prejudice. The adequacy of the theory is questionable. The question has sometimes been raised whether the enlargement can be validated in these cases to afford increased protection for creditors who became such prior to the change as well as for those who become such thereafter. The decision in one of the cases was restricted to debts of the latter class,¹³ while in a recent decision by the Supreme Court of the United States the Court declined to pass on the validity of such change if extended to include additional shareholder's liability to provide for the payment of debts incurred prior to the change, although sustaining it with respect to debts subsequently incurred.¹⁴ The validity of such legislation as applied to prior debts has, however, been sustained on the theory mentioned above.¹⁵ The enlargement of the shareholder's liability for the benefit of prior debts gives prior creditors an advantage beyond that for which they bargained. However, the contract alleged to be impaired by legislation of the kind under consideration is not that between the corporation or its shareholders and corporate creditors but that between the corporation and its shareholders. The fact that such statutes do result in a material alteration of the risks between the corporation and its creditors at the expense of the shareholders is a factor affecting the reasonableness of such legislation which is important in determining its validity to the extent that exercises of the reserved power are required to be reasonable.¹⁶ The questions of the validity of statutory enlargements of shareholders' liabilities arise because the corporate debtor's assets have proved insufficient to meet its liabilities. Corporations in financial difficulties sometimes attempt to save themselves by imposing assessments upon shareholders owning shares that are, under the contract with the corporation, fully paid and non-assessable. There

¹² *Matter of Empire City Bank*, 18 N.Y. 199; *Williams v. Nall*, 108 Ky. 21, 55 S.W. 706; *Bissell v. Heath*, 98 Mich. 472, 57 N.W. 585; *Davis v. Moore*, 130 Ark. 128, 197 S.W. 295; *Sherman v. Smith*, 1 Black 587, 66 U.S. 587, 17 L.Ed. 163.

¹³ *Sherman v. Smith*, 1 Black 587, 66 U.S. 587, 17 L.Ed. 163.

¹⁴ *Stockholders of Peoples Banking Co. v. Sterling*, 300 U.S. 175, 57 S.Ct. 386, 81 L.Ed. 586.

¹⁵ *Davis v. Moore*, 130 Ark. 128, 197 S.W. 295.

¹⁶ See *Shields v. Ohio*, 95 U.S. 319, 24 L.Ed. 357.

is no question as to their power to do this with the consent of all the shareholders, or where this is done by the methods provided for in the articles of incorporation or in the law in force at the time of their organization. Subsequent legislation authorizing such assessments by action of a lesser proportion of shares than required therefor under that law clearly involves a legislative change in the existing contract between the corporation and its shareholders and that among the shareholders themselves, and violates the contract clause unless the circumstances are such as to make it a reasonable exercise of the police power, or, according to some decisions, unless the state has reserved a power of amendment of corporate charters or the law under which the corporations were organized.¹⁷ No case has been found involving a legislative attempt to directly impose such an assessment where the law under which the corporation was organized contained no provision expressly or impliedly authorizing it, but the validity of such legislation would probably be determined by considerations of the kind that have influenced decisions on the validity of subsequent legislation enlarging shareholders' liabilities.¹⁸

The Reserved Power and Corporate Contracts with Third Persons

The problems arising under the contract clause involving those contracts of corporations with other persons which do not involve intracorporate relations are the same as those involving contracts between individuals except that the reserved power to amend or repeal corporate charters or corporation statutes has at times been invoked in connection with them. The employment of that principle in relation to such corporate contracts gives it a scope that cannot reasonably be justified whether it be employed to validate subsequent legislation affecting those contracts to the advantage of the corporation or of those with whom it has contracted. Its use for this purpose has been

¹⁷ Holding that reserved power validated such subsequent legislation; *Gardner v. Hope Ins. Co.*, 9 R.I. 194, 11 Am.Rep. 238; *Somerville v. St. Louis Min. & Mill. Co.*, 46 Mont. 268, 127 P. 464, L.R.A.1915B, 811. Contra: *Garey v. St. Joseph Mining Co.*, 32 Utah 497, 91 P. 369, 12 L.R.A.,N.S., 1554.

cussing the measure of shareholder's obligations courts at times refer to the law in existence when the corporation was organized and at times to the law in force when the shareholder in question became such. The latter would seem to be the crucial time if construed to mean not the time of his acquisition of his shares but the time of their original issue.

¹⁸ It should be noted that in dis-

at times rejected because it was deemed to interfere unreasonably with vested interests. It has, for example, been held that the repeal of a statute imposing on corporate directors a contractual liability to its creditor for losses due to the embezzlement of corporate funds by corporate officers could not validly deprive creditors of accrued rights acquired thereunder, that to give the repeal that effect would impair their contract invalidly and deprive them of property without due process of law, and that the mere reservation of the power to amend or repeal the laws relating to corporations could not validate the repeal.¹⁹ A similar restriction on the scope of the reserved power which resulted in protecting the corporation's interest is found in the decision of the United States Supreme Court that that power did not permit the state to convert a public utility franchise, granted it by a contract with a municipality of that state, from one for a definite duration into one for an indeterminate period.²⁰ In the former of these cases the Court stated that under the reserved power "the corporate charter may be repealed or amended, and within limits not now necessary to define, the interrelations of state, corporation and stockholders may be changed; but neither vested property rights nor the obligation of contracts of third persons may be destroyed or impaired." If there be added the statement that the rights of the corporation under its contracts with third persons are equally protected with those of the third persons thereunder, the statement would represent the present status of the law on this matter. The principle thus formulated accords with the underlying purposes and theory of the reserved power.

The doctrine of the reserved power of the state to amend or repeal corporate charters or the laws under which corporations are permitted to be organized arose primarily out of the decision in the Dartmouth College Case. It had its greatest development during a period when the doctrine that all contracts are made subject to reasonable exercises of a state's police power had either not been developed or been but slightly developed. The need for the doctrine became progressively less as that later doctrine grew in scope and importance. Many of the decisions based on the reserved power could, and would, now be based on the police power. The doctrine of the reserved power, however, still constitutes a part of the general technique employed in deal-

¹⁹ *Coombes v. Getz*, 285 U.S. 434, 52 S.Ct. 435, 76 L.Ed. 866.

²⁰ *Superior Water, Light & Power Co. v. City of Superior*, 263 U.S. 125, 44 S.Ct. 82, 68 L.Ed. 204.

ing with the limitations imposed by the contract clause on the state in regulating corporate affairs and activities.

IMPAIRMENT OF CONTRACTS BY TAXATION

277. A state's power to tax cannot generally be limited by the contracts of private persons who are deemed to exercise their right to contract in subordination to a state's power to tax.
278. The general principle is subject to an exception developed for the purpose of preventing the retroactive taxation of vested interests arising out of private contracts.

The question of the impairment of the obligation of contracts by exercises of a state's taxing power has already been considered in relation to contracts of the state and its subordinate political subdivisions. The contention is, however, frequently made that its exercise impairs the obligation of pre-existing private contracts. It is the general rule that private persons exercise their right to contract in subordination to the state's power of taxation.²¹ The fact that the interests created by the contract were not taxable when the contract was made does not prevent the state from taxing them by subsequent legislation as long as those interests continue in existence.²² Private contracts generally present no obstacle, predicable upon the contract clause, to subsequent changes in the tax laws of a state. A change in the provisions of a tax on the production of oil by apportioning it among all persons interested in an oil lease instead of imposing it on the lessee alone, as provided by the law in force when the lease was made, does not invalidly impair the lessor's rights under the lease.²³ These decisions merely determine that the state may impose the tax regardless of the contract between the parties; they do not decide that the state could validly alter contractual arrangements entered into by private persons as to the ultimate distribution between them of the burden of such taxes. If, for example, the contract considered in the case last cited had provided that the lessee should bear such taxes, subsequent

²¹ *Lake Superior Consol. Iron Mines v. Lord*, 271 U.S. 577, 46 S.Ct. 627, 70 L.Ed. 1093; *Barwise v. Sheppard*, 299 U.S. 33, 57 S.Ct. 70, 81 L.Ed. 23.

²² *Lake Superior Consol. Iron Mines v. Lord*, 271 U.S. 577, 46 S.Ct. 627, 70 L.Ed. 1093.

²³ *Barwise v. Sheppard*, 299 U.S. 33, 57 S.Ct. 70, 81 L.Ed. 23.

legislation requiring the lessor to bear any part thereof would have invalidly impaired such term of the lease.

There is, however, one well established line of cases in which the contract clause has been successfully invoked to invalidate state taxes imposed by statutes enacted after the formation of the contract held to have been impaired thereby. They have all involved attempts to apply provisions of state inheritance tax statutes to certain classes of inter vivos transfers made prior to the enactment of such statutes. The provisions most often involved have been those subjecting to inheritance taxes transfers intended to take effect in possession or enjoyment at or after the grantor's death and the coming into possession or enjoyment of remainders vested in interest prior to the enactment of the taxing statute. It has been held that, where the latter provision results in taxing the entry into possession and enjoyment of a remainder that became vested at a time when the law imposed no tax thereon, its application not only takes property without due process but also impairs the obligation of contracts.²⁴ The cases involving the application to prior transfers of a statutory provision of the kind first mentioned are divisible into those in which the court found that the interests on whose creation or transfer the tax was imposed had become completely vested prior to the enactment of the tax statute and those in which it found that they had not become so vested. The practically uniform rule has been that the taxation of the creation or transfer of interests completely vested at the time of the enactment of the statute imposing the tax violates both the due process clause of the Fourteenth Amendment and the contract clause.²⁵ Neither of these is held to be violated by applying such provision subsequently enacted to prior transfers where the interest created or transferred had not completely vested at the time such provision was enacted.²⁶ The taxation of transfers resulting from the exercise, or the failure to exercise, a power of appointment created

²⁴ Matter of Pell's Estate, 171 N.Y. 48, 63 N.E. 789, 57 L.R.A. 540, 89 Am.St.Rep. 791.

²⁵ Hunt v. Wicht, 174 Cal. 205, 162 P. 639, L.R.A.1917C, 961; In re Craig's Estate, 97 App.Div. 289, 89 N.Y.S. 971, affirmed without opinion 181 N.Y. 551, 74 N.E. 1116; Coolidge v. Long, 282 U.S. 582, 51 S.Ct. 306, 75 L.Ed. 562.

²⁶ Carter v. Bugbee, 92 N.J.L. 390, 106 A. 412; Bryant v. Hackett, 118 Conn. 233, 171 A. 664; Boston Safe Deposit & Trust Co. v. Commissioners of Corporations and Taxation, Mass., 3 N.E.2d 33, 109 A.L.R. 854; In re Seitz's Estate, 262 N.Y. 32, 186 N.E. 193; Binney v. Long, 299 U. S. 280, 57 S.Ct. 206, 81 L.Ed. 239.

when no inheritance tax was imposed thereon does not violate the contract clause.²⁷ No definite statement is warranted as to whether it would be violated by subsequent legislation subjecting to an inheritance tax the shifting of economic benefits to a surviving joint tenant or tenant by the entirety under a tenancy created when no law taxed such shifting.²⁸ The view is advanced in some of the cases that the contract clause prohibits retroactive taxation because it diminishes the value of vested interests. The function of the contract clause in the cases discussed herein has been to furnish support for the protection of vested interests against retroactive taxation additional to that afforded by the due process clause of the Fourteenth Amendment. It is not always clear just what contract is being impaired.

²⁷ Manning v. Board of Tax Com'rs, 46 R.I. 400, 127 A. 865; Chanler v. Kelsey, 205 U.S. 466, 27 S.Ct. 550, 51 L.Ed. 832.

Y. 208, 135 N.E. 247. Cf. In re Weiden's Estate, 144 Misc. 854, 259 N.Y.S. 573, on rehearing 146 Misc. 381, 262 N.Y.S. 437, affirmed 240 App.Div. 716, 265 N.Y.S. 1001, reversed 263 N.Y. 107, 188 N.E. 270.

²⁸ See In re Lyon's Estate, 233 N.

CHAPTER 17

LIMITATIONS ON THE TAXING POWER OF THE STATES

- 279-280. Nature of the Taxing Power.
- 281-282. The "Public Purpose" Doctrine.
 - 283. State Jurisdiction to Impose Taxes.
- 284-286. Equality and Uniformity of Taxation.
 - 287. Retroactive Taxation.
- 288-289. Tax Procedure.

NATURE OF THE TAXING POWER

- 279. The power to tax is a legislative power. It is one of the powers by which a state may appropriate for its own use the property of those subject to its jurisdiction. The factor that distinguishes an appropriation of such property under the taxing power from an appropriation thereof under a state's police power or power of eminent domain is that the appropriation is primarily for the purpose of raising the revenues required to defray the costs of government.
- 280. An exercise of the taxing power inevitably produces certain regulatory effects, and the fact that the legislature was motivated in levying the tax by the desire to secure those effects does not prevent the levy from being deemed a tax if the primary purpose was to raise revenues to defray the costs of government.

The powers reserved to the several states by the federal Constitution include that of taxation. That Constitution contains many important limitations upon their exercise of that power, among which the due process and equal protection clauses of the Fourteenth Amendment are the most pervasive. The constitution of each of the states also contains numerous provisions restricting the exercise of the state's taxing power by the various governmental organs upon which it has been conferred either by that constitution or valid legislation enacted in conformity with its terms. The power to tax is invariably deemed to be a purely legislative function,¹ and may not be exercised by the courts.²

¹ *People ex rel. Griffin v. Mayor, etc., of City of Brooklyn*, 4 N.Y. 419, 55 Am.Dec. 266; *Federal Farm Mortgage Corporation v. Falk*, 67 N.D. 154, 270 N.W. 885, 113 A.L.R. 724.

² *Rees v. City of Watertown*, 19 Wall. 107, 22 L.Ed. 72; *Yost v. Dallas County*, 236 U.S. 50, 35 S.Ct. 235, 59 L.Ed. 460.

It is, however, within the competence of the judicial power to compel those upon whom the law has imposed a non-discretionary duty to levy a tax to do so. This has been frequently done in cases involving attempts by municipal debtors to repudiate their obligations in reliance upon legislation held to impair the obligation of the contracts from which those obligations arose.³ The principal state governmental organ in which a state's constitution vests its taxing power is the state legislature, but it is universally held that it may delegate to subordinate political subdivisions or to specially created districts the power to tax for their local or limited purposes.⁴ The doctrine that the power to tax is legislative in character means only that the determination that a tax is to be levied, the selection of the basis on which it is to be distributed, and the decision as to the principles that define its extent, are required to be made by governmental organs possessing legislative powers. It does not mean that every step in the process by which the tax due from any given taxable subject is arrived at is legislative and required to be performed by such governmental organs. The assessment of a particular taxpayer's income tax on the basis of the return filed by him is in no sense a legislative, but an administrative, process.

Taxation for Revenue Purposes

The taxing power is but one of those by which government appropriates for its own use the property of those within its jurisdiction. It may also do so through exercises of its power of eminent domain and its police or general regulatory power. There are, however, marked differences in the constitutional requirements imposed upon the exercise of these different powers. The due process clause of the Fourteenth Amendment, and state constitutional provisions also, require a state to make specific compensation for any property taken by it under its power of eminent domain. Those constitutional provisions impose no such requirement when a state appropriates private property through exercises of its police or taxing powers. The

³ *Meriwether v. Garrett*, 102 U.S. 472, 26 L.Ed. 197.

⁴ This rule is generally based on a recognition of the principle of local self-government as an element in the constitutional theories embodied in state constitutions. There exists a division of opinion as to whether the

power to levy taxes for local purposes may validly be conferred upon non-elective officials; *State v. West Duluth Land Co.*, 75 Minn. 456, 78 N.W. 115 (holding that it may be so conferred); *Wilson v. School Dist. of Phila.*, 328 Pa. 225, 195 A. 90, 113 A.L.R. 1401 (holding that it may not be so conferred).

taking of property by an exercise of the power of eminent domain is usually so distinct a process that it is seldom, if ever, confused with the appropriation of private property by an exercise of one of the other of said powers. It is not, however, always easy to determine whether an appropriation of such property is being made under a state's police or its taxing power. The state constitutional limits on these powers are frequently different, and this has forced courts to develop tests for determining whether a particular appropriation of private property is referable to the state's police power or its taxing power. The tests have practically always had reference to those exercises of the police power which involved a transfer of a portion of the regulated person's wealth to the government rather than those involving the destruction of a portion of his property for the public good. The results of such an exercise of a state's police power are in this respect the same as those that would have been produced by the levy of a tax of the same magnitude. It is also apparent that the social and economic consequences of a transfer of a portion of one's wealth to government do not depend on whether the transfer is demanded under the police or taxing power but rather on its extent and incidence.⁵ The power to tax can be, and in fact is, used as a method of regulating business and conduct, and as an instrument of social policy. These factors make it practically impossible to determine from the consequences of a given financial demand made by a state upon its citizens whether it is referable to its police or taxing powers. The test most frequently employed is whether the primary purpose of the legislature in making the exaction is regulation or raising revenue to defray governmental expenses.⁶ The direct and indirect consequences of making and enforcing the exaction are frequently used as indicia of the legislative intent despite the fact that the use of such indicia for that purpose involves both logical and practical difficulties. The subjective character of the test has rendered a degree of inconsistency in its application inevitable. The need for determining whether a state statute imposing financial exactions is referable to its

⁵ This statement refers only to the act of government insofar as it involves a transfer of a portion of a person's wealth to it, and ignores any differences that may result from other provisions found in the legislation under which that transfer is demanded.

⁶ *State v. Anderson*, 144 Tenn. 564, 234 S.W. 768, 19 A.L.R. 180. This case involved a situation in which the validity of a license fee under the provisions of the state constitution turned on whether the imposition of the fee was an exercise of the state's police or taxing power.

police or taxing powers may also arise in measuring its validity under the federal Constitution. The commerce clause permits a state to subject goods moving in interstate commerce to reasonable inspection and to charge an inspection fee in that connection, but at the same time prohibits it from taxing such articles. It has been invariably held that an inspection fee whose proceeds uniformly exceed the reasonable cost of the inspection service by a vaguely defined amount becomes, as to such excess, an invalid tax on interstate commerce.⁷ The conclusion is based on the theory that the primary purpose of the legislature in so fixing the inspection fee as to produce such excess was to raise revenue to defray the general costs of government.

Regulation as a Motive for Taxation

It has already been stated that the economic and social effects of a financial exaction made by government upon those within its jurisdiction are not dependent upon the intention and purposes of the legislature in imposing it. Its regulatory effects occur despite any legislative intention with respect thereto. They are as normal a consequence of exercises of the taxing power as of equivalent exertions of the police power. The same factors that make it impossible for a state to avoid the economic and social implications of its taxing system, even when it has been devised solely for revenue purposes, afford a basis for its conscious use of its taxing power for purposes of regulation. The usual methods employed by it for that purpose are fixing the amount of a tax so as to promote what it conceives to be desirable objectives, selecting particular tax subjects or particular classes of persons by reference thereto, granting exemptions from taxation for such purpose, or combining one or more of these methods. Its use of any one or all of them is limited by provisions contained in its own constitution and in that of the United States. The provisions of the latter that will be here considered are those found in the first section of the Fourteenth Amendment.⁸ The mere fact that a state consciously uses its

⁷ See discussion of this problem in *D. E. Foote & Co. v. Stanley*, 232 U.S. 494, 34 S.Ct. 377, 58 L.Ed. 698. The legal character of a charge imposed by state law also affects the state's power to collect it from a federal instrumentality, *Fed. Land Bank of New Orleans v. Crosland*, 261 U.S.

374, 43 S.Ct. 385, 67 L.Ed. 703, 29 A.L.R. 1.

⁸ The limits imposed on a state's taxing power by such provisions of the federal Constitution as the commerce clause, the interstate privileges and immunities clause, the con-

taxing power for purposes of regulation violates no provision of said first section.⁹ It has been stated that taxation "may be made the implement of the exercise of a state's police power" and that resort to reasonable discriminations in imposing taxes may be made to promote a legitimate social objective.¹⁰ Not only does the equal protection clause not prohibit such use of the power to classify for tax purposes, but the fact that a classification operates in that manner is frequently used to support the conclusion that such classification is reasonable and, therefore, valid. The validity of a taxing system under which corporate shares were taxed only in the hands of corporate owners was sustained because, among other reasons, the state was free to resort to that method to discourage such ownership.¹¹ Imposing a license tax upon the use of herring for non-food purposes while imposing no such tax on the use of other fish therefor has been held valid as a proper method for promoting what was deemed a socially desirable use of particular natural resources.¹² The fact that relieving bituminous coal from a special tax imposed upon anthracite would aid in developing a state's manufacturing resources was among the reasons inducing the Court to sustain the classification of coal into those two classes.¹³

The deliberate use of the power of tax classification as an instrument of regulation or for attaining legitimate social objectives cannot be held to invalidate such classifications within the limits within which the Court has invoked, or is likely in the future to invoke, considerations such as those referred to above in sustaining tax classifications against objections based on the

tract clause, and the implied immunity of the federal government and its agencies and instrumentalities from state taxation, have been discussed in other chapters of this text.

⁹ A. MAGNANO CO. v. HAMILTON, 292 U.S. 40, 54 S.Ct. 599, 78 L. Ed. 1109, Black's Cas. Constitutional Law, 2d, 556.

¹⁰ GREAT ATLANTIC & PACIFIC TEA CO. v. GROSJEAN, 301 U.S. 412, 57 S.Ct. 772, 81 L.Ed. 1193, 112 A.L.R. 293, Black's Cas. Constitutional Law, 2d, 584.

¹¹ Ft. Smith Lumber Co. v. State of Arkansas ex rel. Arbuckle, 251 U.S. 532, 40 S.Ct. 304, 64 L.Ed. 396.

¹² Alaska Fish Salting & By-Products Co. v. Smith, 255 U.S. 44, 41 S.Ct. 219, 65 L.Ed. 489. The case involved a tax imposed by the Territory of Alaska, but the bases for assailing it were similar to those on which a state tax would have been assailed under the equal protection and due process clauses of the Fourteenth Amendment, U.S.C.A.Const.

¹³ Heisler v. Thomas Colliery Co., 260 U.S. 245, 43 S.Ct. 83, 67 L.Ed. 237.

equal protection clause. It is possible to indicate the regulatory policies that may be promoted by a deliberate use of the power to classify in exercising the taxing power so far only as specific decisions thus far rendered include them or contain a general principle from which others may be deduced. Such decisions also operate negatively by excluding from the factors that render such classifications invalid the mere facts that they operate as regulations and were adopted in order to secure that effect. It has, however, never been decided that a tax classification is validated by the mere fact that it has certain regulatory effects or that the legislature adopted it in whole or in part in order to secure those effects. A principle as broad as that would practically eliminate the equal protection clause as a limit on a state's taxing power since few, if any, tax classifications entail no regulatory effects any or all of which the legislature may have intended to secure by its classification. The limit on a state's power to use tax classification as a means of regulation or as an instrument for the promotion of given social policies is to be found in the character of the regulation effected thereby and of the social policies intended to be realized thereby. It has been held that the privileges and immunities clause of the Fourteenth Amendment prohibits a state from using its power to make tax classifications to promote local public policy at the expense of the constitutionally protected policy embodied in that clause.¹⁴ It has also been held that the provision of that Amendment prohibiting a state from depriving any person of liberty without due process of law prohibits a state from using its power to select what it will tax so as to destroy the liberty of the press.¹⁵ The use of the taxing power as an instrument of regulation and policy was held invalid in these cases because the regulation and the policies aimed to be achieved conflicted with constitutionally protected interests. The same principle defines the limits imposed by the equal protection clause upon a state's use of its power to make tax classifications as an instrument of regulation and general social policy. The guarantee of that very clause against a state's distribution of its tax burden in an unreasonably discriminatory manner is itself one of those constitutionally protected interests that limit its regulatory use of its power to make tax classifications. The circuitry of reasoning that seems implicit in this view can be avoided only by

¹⁴ *Colgate v. Harvey*, 296 U.S. 404, 56 S.Ct. 252, 80 L.Ed. 299, 102 A.L.R. 54.

¹⁵ *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660.

postulating a more or less definitive scale of social values which it is the function of the courts to formulate in their interpretation of the relevant constitutional provisions. Similar problems may arise in testing the validity of tax classifications by some of the general limitations thereon found in the constitutions of the several states.

Prohibitive Taxation

It is factually possible for a state so to exercise its taxing power as to destroy a given activity or business. It can do that by taxing them so much more heavily than competing activities and businesses that effective and profitable competition with the latter becomes impossible, or by imposing upon them a non-discriminatory tax of such magnitude that continued operation on a profitable basis becomes impossible. A discriminatory use of the taxing power does not violate the equal protection clause merely because it favors certain industries,¹⁶ nor because it favors one method of carrying on a given business in comparison with others.¹⁷ A classification otherwise valid is not rendered invalid because it has those effects, but it has never been decided that their presence cannot be a factor in determining the reasonableness and validity of a classification.¹⁸ It has also been stated that the due process clause of the Fourteenth Amendment does not prohibit a state from imposing so burdensome a tax that it will restrict or destroy particular occupations or businesses even though the achievement of that collateral purpose may have motivated the legislature in levying the tax.¹⁹ State taxes that were alleged to have been im-

¹⁶ *Quong Wing v. Kirkendall*, 223 U.S. 59, 32 S.Ct. 192, 56 L.Ed. 350 (sustaining a tax on hand laundries that was not imposed on steam laundries).

¹⁷ *GREAT ATLANTIC & PACIFIC TEA CO. v. GROSJEAN*, 301 U.S. 412, 57 S.Ct. 772, 81 L.Ed. 1193, 112 A.L.R. 293, Black's Cas. Constitutional Law, 2d, 584 (sustaining a discriminatory tax against chain stores).

¹⁸ *A. MAGNANO CO. v. HAMILTON*, 292 U.S. 40, 54 S.Ct. 599, 78 L.Ed. 1109, Black's Cas. Constitutional Law, 2d, 556. The Court in this case sustained an excise on the local

sale of butter substitutes. Its sole reason was that the obvious differences between them and butter justified their separate classification for tax purposes. In discussing the validity of the tax under the due process clause of the Fourteenth Amendment, U.S.C.A.Const., the Court assumed that the tax might or would destroy the business of making local sales of such substitutes.

¹⁹ *A. MAGNANO CO. v. HAMILTON*, 292 U.S. 40, 54 S.Ct. 599, 78 L.Ed. 1109, Black's Cas. Constitutional Law, 2d, 556; see also *Alaska Fish Salting & By-Products Co. v. Smith*,

posed for such purpose, and to be almost certain to result in the destruction of the businesses subjected to them, have been held not to violate the due process clause.²⁰ It has, however, also been stated that a tax would violate that clause if the form of taxation were adopted as a mere disguise under which a state attempted to exercise a power denied to it by the federal Constitution, such as that of confiscating property.²¹ Existing decisions give no very definite clue as to the tests to be employed for distinguishing a valid exercise of the taxing power which in fact results in the restriction or destruction of a business from an invalid use thereof as a disguise to accomplish an unconstitutional objective. The use of the taxing power to destroy a business that might be validly prohibited, or to restrict it within the limits within which it might be validly restricted by an exercise of the police power, violates neither the due process nor equal protection clauses of the Fourteenth Amendment.²² The decision in *A. Magnano Co. v. Hamilton* seems to permit the destruction by taxation of a business whose complete prohibition would appear to be of doubtful constitutionality.²³ The federal Supreme Court has thus far given very little indication as to the precise limits on a power which it has admitted to be subject to a limit. The language in which it has formulated that limit implies that legislative motives in imposing the tax constitute an important factor in its definition. A tax imposed purely for revenue purposes is certain to be held not to have transgressed that limit even though its magnitude results in the restriction or destruction of any or all businesses or occupations.²⁴

255 U.S. 44, 41 S.Ct. 219, 65 L.Ed. 489.

²⁰ *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 36 S.Ct. 370, 60 L.Ed. 679, L.R.A.1917A, 421, Ann.Cas. 1917B, 455 (license tax on merchants using redeemable coupons in sale of merchandise); *A. MAGNANO CO. v. HAMILTON*, 292 U.S. 40, 54 S.Ct. 599, 78 L.Ed. 1109, Black's Cas. Constitutional Law, 2d, 556.

²¹ *A. MAGNANO CO. v. HAMILTON*, 292 U.S. 40, 54 S.Ct. 599, 78 L.Ed. 1109, Black's Cas. Constitutional Law, 2d, 556.

²² See *GREAT ATLANTIC & PACIFIC TEA CO. v. GROSJEAN*, 301

U.S. 412, 57 S.Ct. 772, 81 L.Ed. 1193, 112 A.L.R. 293, Black's Cas. Constitutional Law, 2d, 584.

²³ This statement assumes that *Powell v. Pennsylvania*, 127 U.S. 678, 8 S.Ct. 992, 1257, 32 L.Ed. 253, would not govern the matter; see *John F. Jelke Co. v. Emery*, 193 Wis. 311, 214 N.W. 369, 53 A.L.R. 463.

²⁴ There are many state decisions that construe either the provisions of the Fourteenth Amendment to the federal Constitution, or broad provisions of their respective state constitutions, as prohibiting resort to the taxing power to destroy a business or occupation which the state

THE "PUBLIC PURPOSE" DOCTRINE

281. The constitutions of most of the states provide that taxes may be levied for public purposes only. The due process clause of the Fourteenth Amendment has been construed to limit the states' exercise of their taxing power to taxation for public purposes. A state may define "public purpose", as used in its constitution, more narrowly than required by the due process clause of the Fourteenth Amendment, but may not give that concept a broader scope than permitted by that clause.
282. The power of the states and their governmental agencies and political subdivisions to borrow on their credit is also limited by the requirement that the public credit shall be used for public purposes only. The constitutional bases for that requirement are found in their respective constitutions and in the due process clause of the Fourteenth Amendment.

Constitutional Basis of the "Public Purpose" Doctrine

A tax is an enforced contribution exacted by government from persons and things within its jurisdiction for the purpose of raising revenues to defray the cost of government.²⁵ Its most important aspect is that it is a means for distributing that burden and not an assessment of benefits. The only benefits to which a general taxpayer is constitutionally entitled are those derived from living in an organized society made possible and secured by the activities of the government imposing the tax.²⁶ Neither the due process, nor any other clause, of the Fourteenth

may not validly prohibit under an exercise of its police power; *State v. Osborne*, 171 Iowa 678, 154 N.W. 294, Ann.Cas.1917E, 497; *Peterson Baking Co. v. City of Fremont*, 119 Neb. 212, 228 N.W. 256. There are decisions that a tax, even if levied solely for revenue purposes, is invalid under some of the broad provisions contained in the bill of rights of a state's constitution, merely because of its magnitude; *Martin v. Nocero Ice Cream Co.*, 269 Ky. 151, 106 S.W. 2d 64 (tax on sale of ice cream); this principle is held not to apply where the tax is on a business which the state may validly prohibit, *Com-*

monwealth, for Use and Benefit of City of Wilmore, v. McCray, 250 Ky. 182, 61 S.W.2d 1043.

The due process clause of the Fifth Amendment, U.S.C.A.Const., is not violated by a federal tax merely because its imposition may destroy the taxed business; *McCray v. U. S.*, 195 U.S. 27, 24 S.Ct. 769, 49 L.Ed. 78, 1 Ann.Cas. 561.

²⁵ *People ex rel. Griffin v. Mayor, etc. of City of Brooklyn*, 4 N.Y. 419, 55 Am.Dec. 266.

²⁶ *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 57 S.Ct. 863, 81 L.Ed. 1245, 109 A.L.R. 1327.

Amendment protects a person against being compelled to pay taxes devoted to purposes from which he derives no immediate and direct benefit, nor do they require that a person shall not be taxed to meet the costs incurred by government in dealing with a problem merely because he has had no part in creating it.²⁷ There are important constitutional restrictions on the purposes for which, and the activities in connection with which, those costs may be incurred. The most important and pervasive limitation is found in the requirement that taxes may be levied for public purposes only. It is a requirement that has regard only to the uses that may be made of the revenues derived from taxes. The attempt to deduce from it a limitation on the ulterior purposes, other than revenue, for which the taxing power may be validly exercised has been rejected.²⁸ The limitation has at times been deduced from the very conception of a tax, or been deemed implicit in the very nature of free government.²⁹ Its present constitutional basis is now recognized to be either a specific provision of the state constitution imposing the requirement,³⁰ some broad general provision thereof from which it has been deduced, or the due process clause of the Fourteenth Amendment to the federal Constitution.³¹ The provisions of a state constitution operate as a limit on the governmental organs

²⁷ Examples of this are found in *Thomas v. Gay*, 169 U.S. 264, 18 S.Ct. 340, 42 L.Ed. 740, holding that corporate taxpayers may be assessed for school taxes; *Memphis & C. R. Co. v. Pace*, 282 U.S. 241, 51 S.Ct. 108, 75 L.Ed. 315, 72 A.L.R. 1096, holding that railroad property may be required to pay general taxes for road purposes although receiving no special benefit therefrom; *Nashville, C. & St. L. R. Co. v. Wallace*, 288 U.S. 249, 53 S.Ct. 345, 77 L.Ed. 730, 87 A.L.R. 1191 same with respect to gasoline tax used for road construction; and *Roberts v. Richland Irr. Dist.*, 289 U.S. 71, 53 S.Ct. 519, 77 L.Ed. 1038, holding that general taxes may be levied on property to make up deficiencies resulting from delinquent special assessments even though the total payments contributed by the taxed property to finance the cost of the improvement already

exceeded the benefits derived by it therefrom.

²⁸ *A. MAGNANO CO. v. HAMILTON*, 292 U.S. 40, 54 S.Ct. 599, 78 L. Ed. 1109, *Black's Cas. Constitutional Law*, 2d, 556.

²⁹ *Citizens' Saving & Loan Ass'n v. Topeka*, 20 Wall. 655, 22 L.Ed. 455.

³⁰ Many state constitutions expressly provide that taxes shall be raised for public purposes only.

³¹ *Jones v. City of Portland*, 245 U.S. 217, 38 S.Ct. 112, 62 L.Ed. 252, L.R.A.1918C, 765, *Ann.Cas.*1918E, 660, *GREEN v. FRAZIER*, 253 U.S. 233, 40 S.Ct. 499, 64 L.Ed. 878, *Black's Cas. Constitutional Law*, 2d, 559. The purposes for which the taxing power was to be used in these cases were held proper.

upon which it has conferred the power to tax, but do not prevent the amendment of that constitution to abolish this requirement. The due process clause of the Fourteenth Amendment, however, limits a state to the use of its taxing power for public purposes even where its own constitution makes no such requirement. There may exist considerable differences between the specific purposes that are deemed public under the state constitutional provision and those that are deemed such within the meaning of the due process clause of the Fourteenth Amendment. These differences can exist in one direction only. A state may give its constitution a construction that excludes from the permissible public purposes some that would be held proper public purposes within the meaning of the due process clause of the Fourteenth Amendment. It may not so construe its own constitution as to permit taxation for a purpose that is not a public purpose within the meaning of that due process clause, since that is a limitation upon a state constitution as well as upon state legislative, judicial and executive action. The maximum scope of the public purpose concept is thus a matter of federal constitutional law, while its minimum scope is a matter depending upon the provisions of a state's own constitution. There is nothing to prevent a state from construing its own constitutional provision so as to give it the same scope as the due process clause of the Fourteenth Amendment.

Meaning of "Public Purpose"

No court has ever formulated a definition of "public purpose" which is at once both logically correct and adequate. It has been recognized by most courts that each case must be determined largely by its own specific circumstances. The result has been that the only feasible approach to the problem consists in indicating the factors invoked, and the general lines of reasoning employed, in dealing with it. The power to tax was conferred to enable government to finance the cost of performing its functions. The extent to which the requirement that taxes may be levied for public purposes only limits the taxing power cannot be rationally or reasonably determined without some theory as to what constitute the proper and permissible functions of government. It is not impossible, but highly improbable, that judicial theories on that matter will be uninfluenced by traditional conceptions based on both the practices of the governments of our constitutional system and the political theories generally accepted as implicit in that system. The result has

been that the scope of permissible public purposes has gradually expanded as generally accepted political theories have assigned an increasing role to government in regulating the social and economic life of the people and in assuming service functions for the promotion of the general welfare. The influence of this factor cannot be precisely measured, but the long time trend of the decisions cannot be adequately understood if this factor is completely excluded.

It has always been, and still is, an accepted part of our theory of government that the regulation of conduct for the promotion of the general safety, health, morals and welfare is a proper governmental function. A tax to defray the costs incurred in performing that function is so clearly for a public purpose that it has seldom, if ever, been contested on that basis. There has been no period in the history of this nation when the activities of our state governments have been limited to exerting their regulatory functions. The grant of bounties and subsidies from the public resources, and the conduct of some forms of service enterprise by the state or its subdivisions, have ever prevailed to a limited extent. The principal problems of what constitute public purposes have concerned the extent to which a state may tax to finance activities belonging to one or the other of the last mentioned classes. The expenditure of public funds almost invariably involves their payment to private persons. This fact alone does not render such use of public funds invalid despite the fact that courts at times support a decision that a given use of public funds is invalid by invoking that factor. The validity of an expenditure of public funds the immediate benefit of which accrues to a private person depends upon the basis for his receipt thereof. If he receives any part of such funds as compensation for services rendered to the government that pays him in connection with the performance by it of its proper governmental functions, then the tax from which the revenue so disposed of was derived is deemed to have been levied for a proper public purpose. The same principle validates a tax whose proceeds are used to pay a governmental debt incurred in performing such government's proper functions. It is also the generally prevailing view that a state's tax revenues may be used to discharge its moral obligations.³² There appears to be no very definite rule for determining the facts that

³² *Commonwealth v. Ferries Co.*, W. 554, 98 A.L.R. 280; *In re Borup*, 120 Va. 827, 92 S.E. 804; *In re Montfort's Estate*, 193 Minn. 594, 259 N. St.Rep. 796.

will suffice to raise the requisite moral obligation.³³ The use of public funds to cover expenditures of the foregoing classes promotes the general welfare because the governmental activities in connection with which they were made are deemed to do so.

There is a class of cases in which public funds are paid to private persons rendering the government no specific service in return therefor in connection with its performance of its own functions. The validity of such use of the public funds depends upon the extent to which, and the manner in which, it tends to promote the general welfare. The support and maintenance of the indigent and those unable to care for themselves has long been accepted as a proper function of government. The public funds may validly be used to defray the costs of its performance even though the immediate and direct benefit accrues only to those who receive such public aid.³⁴ The general welfare is deemed promoted thereby because of the indirect public benefits that flow from the removal of excessive pauperism. The same general principle would justify taxation to provide a system of unemployment compensation,³⁵ and would go far to validate taxation to provide a system of old age pensions regardless of the needs of specific pensioners. The general welfare is assumed to be promoted through education. The benefits flow from the fact that the public is provided therewith regardless of the agency through which it is furnished. It is for this reason that free text-books may be furnished to those enrolled in schools even when not maintained and operated by public authority.³⁶ The same kind of considerations apply to validate the use of public funds to provide care and maintenance for the indigent or dependent in privately operated institutions.³⁷ There

³³ See, in addition to the cases cited in footnote 32, the following: *Board of Education of Calloway County v. Talbott*, 261 Ky. 66, 86 S. W.2d 1059; *Ausable Chasm Co. v. State*, 266 N.Y. 326, 345, 194 N.E. 843; *Mullane v. McKenzie*, 269 N. Y. 369, 190 N.E. 624, 103 A.L.R. 758; *Leonard v. Inhabitants of Middleborough*, 198 Mass. 221, 84 N.E. 323; *Chapman v. City of New York*, 168 N.Y. 80, 61 N.E. 108, 56 L.R.A. 846, 85 Am.St.Rep. 661.

³⁴ See *Carmichael v. Southern Coal*

& Coke Co., 301 U.S. 495, 57 S.Ct. 868, 81 L.Ed. 1245, 109 A.L.R. 1327; *State v. Nelson County*, 1 N.D. 88, 45 N.W. 33, 8 L.R.A. 283, 26 Am.St.Rep. 609.

³⁵ *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 57 S.Ct. 868, 81 L.Ed. 1245, 109 A.L.R. 1327.

³⁶ *Cochran v. Louisiana State Board of Education*, 281 U.S. 370, 50 S.Ct. 335, 74 L.Ed. 913.

³⁷ *Wisconsin Industrial School for Girls v. Clark County*, 103 Wis. 651,

is no logical reason for not extending the principle so as to justify public support for privately operated schools.³⁸ There is, however, a limit to a state's power to donate public funds to private persons even though they are required to be used by the donees in a manner which would confer benefits upon a large part or the whole of the general public. Public grants to subsidize purely private business enterprises are invariably held invalid.³⁹ The fact that railroads are public utilities under a duty to serve the public generally has led some courts to hold that public funds may validly be used to subsidize them even when privately owned and operated.⁴⁰ The reason usually given for denying the validity of public subsidies to ordinary private business enterprises is that the public benefits therefrom are too indirect and remote. This seems to mean no more than that the private benefits therefrom preponderate over such public advantages as may flow therefrom. Such subsidies have occasionally been sustained where the character of the subsidized activities was such as to directly promote some other phase of the general welfare than that derived from the private development of a state's economic resources and activities, such as education.⁴¹ The theory underlying such decisions affords a convenient method for greatly reducing the limiting effect of the "public purpose" doctrine.⁴²

A considerable part of the activities of governments today consists in conducting service enterprises. These have been constantly increasing, and bid fair to increase during an indefinite future period. The validity of financing some of these from tax revenues is now universally recognized. These include such activities as the construction and maintenance of public roads, parks, playgrounds, schools, and universities. The gen-

79 N.W. 422; *Hager v. Kentucky Children's Home Soc.*, 119 Ky. 235, 83 S.W. 605.

³⁸ See cases in footnote 37.

³⁹ *Citizens' Saving & Loan Ass'n v. Topeka*, 20 Wall. 655, 22 L.Ed. 455; *Minnesota Sugar Co. v. Iverson*, 91 Minn. 30, 97 N.W. 454; *Clee v. Sanders*, 74 Mich. 692, 42 N.W. 154; *English v. People*, 96 Ill. 566; *Weisner v. Village of Douglas*, 64 N.Y. 91, 21 Am.Rep. 536; *Ferrell v. Doak*,

152 Tenn. 88, 275 S.W. 29, 46 A.L.R. 590.

⁴⁰ *Perry v. City of Keene*, 56 N.H. 514. Contra, *People ex rel. Detroit & H. R. Co. v. Township Board of Salem*, 20 Mich. 452, 4 Am.Rep. 400.

⁴¹ *City of Minneapolis v. Janney*, 86 Minn. 111, 90 N.W. 312.

⁴² The "public purpose" doctrine has not prevented subsidies to private business through grants of tax exemptions.

eral welfare may also be promoted through the construction and maintenance of drainage or irrigation works, and taxes levied to defray the cost of such activities are levied for a valid public purpose.⁴³ The mere fact that the immediate benefits from such undertakings accrue to a limited portion of the public does not prevent the existence of the requisite public purpose. It has also been held that taxes may be levied to promote agriculture by providing county agents charged with the duty of conducting educational activities tending to increase the efficiency of farm operations.⁴⁴ The principal controversies in this field have arisen when a state, or one of its political subdivisions, has, in order to promote some elements of the general welfare, undertaken to engage in activities theretofore deemed reserved for private enterprise. The past decisions of state courts on the use of the taxing and borrowing powers to finance public ownership and operation of such enterprises have not been harmonious. The same activity has been held valid in one state and invalid in another.⁴⁵ The recent trend is clearly in the direction of sustaining public ownership and operation of businesses to an extent that would have been deemed impossible a generation ago.⁴⁶ The Supreme Court of the United States has so construed the due process clause of the Fourteenth Amendment as to interpose practically no obstacle to the expansion of state business enterprises. It has sustained the operation of municipal wood and

⁴³ *Fallbrook Irr. District v. Bradley*, 164 U.S. 112, 17 S.Ct. 56, 41 L. Ed. 369; *State ex rel. Utick v. Board of Com'rs of Polk County*, 87 Minn. 325, 92 N.W. 216, 60 L.R.A. 161. But where the construction of a drainage ditch could benefit but one person's land it was held that an assessment on other lands involved a use of the taxing power for a private purpose, *State ex rel. Schubert v. Board of Supervisors of Town of Rockford*, 102 Minn. 442, 114 N.W. 244, 120 Am.St.Rep. 640.

⁴⁴ *Carman v. Hickman County*, 185 Ky. 630, 215 S.W. 408.

⁴⁵ *Holton v. City of Camilla*, 134 Ga. 560, 68 S.E. 472, 31 L.R.A., N.S. 116, 20 Ann.Cas. 199 (sustaining a municipality's power to manufacture

and sell ice); contra, *State ex rel. Kansas City v. Orear*, 277 Mo. 303, 210 S.W. 392; *Central Lumber Co. v. City of Waseca*, 152 Minn. 201, 188 N.W. 275 (sustaining municipal coal and fuel yard); contra, *Baker v. City of Grand Rapids*, 142 Mich. 687, 106 N.W. 208.

⁴⁶ See *Albritton v. City of Winona, Miss.*, 178 So. 799, 115 A.L.R. 1436 (sustaining municipal construction of factories to be leased as part of plan for dealing with unemployment); *Carroll v. City of Cedar Falls*, 221 Iowa 277, 261 N.W. 652 (sustaining municipal manufacture of electrical power for sale outside of the city's boundaries, the power not being excess power manufactured by a plant constructed to supply the municipality's own inhabitants).

coal yards,⁴⁷ and the maintenance and operation by a state of an extensive system of industries, banking, milling, and home building.⁴⁸ It has stated, in a case not involving taxation, that a state may engage in almost any business generally conducted by private enterprise if its legislature considers it for the general public good to engage therein.⁴⁹ Its general attitude has been, and still is, that what is or is not a public purpose is a question concerning which a state's legislative and judicial authorities are peculiarly able to judge because of their superior information as to the local situation in the light of which the answer must be given. It is, therefore, inclined to accept their judgment on that matter except in very clear cases of the use of public funds for private purposes.⁵⁰ It has seldom found such an abuse of state power as to hold invalid the use of state funds to finance state or municipal operation of businesses generally conducted by private enterprise. It does not deny that the issue of what is a public purpose within the purview of the due process clause of the Fourteenth Amendment is one of federal constitutional law to which it is empowered to give the final answer. Its position is rather that the constitutional problem is so closely associated with matters of local policy as to require a broad construction of this constitutional limitation on a state's taxing power. The state and local taxpayer can find but little protection in the due process clause of the Fourteenth Amendment against being taxed to finance state capitalism or state socialism. The provisions of his own state constitution constitute his principal protection in this field.

The decisions on what do or do not constitute valid public purposes reveal no single test of either inclusion or exclusion. The considerations that are relied upon in some cases to hold a given purpose to be a public purpose are not deemed to require the same conclusion in other cases. An expenditure of public funds is not prevented from being for a public purpose merely because the activity financed thereby is conducted by a private

⁴⁷ *Jones v. City of Portland*, 245 U.S. 217, 38 S.Ct. 112, 62 L.Ed. 252, L.R.A.1918C, 785, Ann.Cas.1918E, 660.

⁴⁸ *GREEN v. FRAZIER*, 253 U.S. 233, 40 S.Ct. 499, 64 L.Ed. 878, *Black's Cas. Constitutional Law*, 2d, 559.

⁴⁹ *Chas. Wolff Packing Co. v. Court of Industrial Relations of*

State of Kansas, 262 U.S. 522, 43 S.Ct. 630, 67 L.Ed. 1103, 27 A.L.R. 1280.

⁵⁰ *GREEN v. FRAZIER*, 253 U.S. 233, 40 S.Ct. 499, 64 L.Ed. 878, *Black's Cas. Constitutional Law*, 2d, 559; *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 57 S.Ct. 868, 81 L.Ed. 1245, 109 A.L.R. 1327.

instrumentality. The cases sustaining public subsidies to privately owned and operated railroads are a case in point.⁵¹ It is, however, equally well established that an expenditure of public funds is not necessarily for a public purpose solely because the public itself conducts the activity financed thereby. The cases holding invalid the conduct of the business of selling ice and gasoline reject that test of the existence of a public purpose.⁵² It is, however, certain that the presence of this factor increases the probability that the required expenditure will be held to be for a public purpose. The public operation of grain elevators in an agricultural state has been held valid,⁵³ while the public subsidization of their private operation has been held invalid.⁵⁴ The Supreme Court recognized the importance of this difference in *Green v. Frazier*.⁵⁵ The fact that a given expenditure will result in an ultimate indirect public benefit has been held not to make its purpose public,⁵⁶ although some courts have deemed the presence of such result an adequate basis for holding a given expenditure to be for a public purpose.⁵⁷ The same differences exist with respect to the importance of the consideration that a part only of the public can derive a direct benefit from the expenditure. This very absence of precise and definite tests has been an important factor in enabling the concept of "public purpose" to be adapted to changing conceptions of governmental functions and activities.

⁵¹ *Perry v. City of Keene*, 56 N.H. 514.

⁵² *State ex rel. Kansas City v. Orear*, 277 Mo. 303, 210 S.W. 392 (ice); *White Eagle Oil & Refining Co. v. Gunderson*, 48 S.D. 608, 205 N.W. 614, 43 A.L.R. 397 (gasoline); contra to last case, *Mutual Oil Co. v. Zehrung*, D.C., 11 F.2d 887.

⁵³ *GREEN v. FRAZIER*, 253 U.S. 233, 40 S.Ct. 499, 64 L.Ed. 878, *Black's Cas. Constitutional Law*, 2d, 559.

⁵⁴ *Vette v. Childers*, 102 Okl. 140, 228 P. 145.

⁵⁵ 253 U.S. 233, 40 S.Ct. 499, 64 L.Ed. 878.

⁵⁶ *Lowell v. City of Boston*, 111 Mass. 454, 15 Am.Rep. 39.

⁵⁷ *Carman v. Hickman County*, 185 Ky. 630, 215 S.W. 408; *Fallbrook Irr. Dist. v. Bradley*, 164 U.S. 112, 17 S.Ct. 56, 41 L.Ed. 369.

STATE JURISDICTION TO IMPOSE TAXES

283. The provision of the Fourteenth Amendment that prohibits a state from depriving a person of property without due process of law has been construed to limit a state's jurisdiction to impose taxes regardless of the kind of tax involved. The general principle based on that clause is that a state may tax those taxable subjects only that are within its territorial boundaries. The derivative principles that determine what taxable subjects are within its territorial boundaries vary with the type of tax involved, and have been formulated to a considerable extent by invoking such considerations of policy as fairness and reasonableness in the distribution of a state's tax burdens.

It has always been an accepted principle of our legal system that a state's power to tax was subject to certain definite territorial limitations. The basis for this position was a more or less consistently applied territorial theory of law which was quite independent of any particular constitutional provision.⁵⁸ It was universally recognized that tangible realty, interests therein, and transfers thereof, could be taxed only by the state in which it had its physical location. The decisions in general applied the same rule to a state's levy of property taxes upon tangible personal property, and determined the place of taxation for purposes of imposing property taxes upon such tangible personalty as had a relatively impermanent physical location by invoking recognized legal conceptions that were frequently based on considerations of convenience and justice in matters of taxation. Among such theories were those that the situs of ships is at the port of their registry,⁵⁹ and the more pervasive one that the situs of moveables is at the domicile of their owner. The latter of these played an important role in defining a state's power to tax the transfer of tangible personalty, and to subject intangible personalty and its transfer to taxation.⁶⁰ The desire to avoid multi-state taxation of the same property contributed to shaping the law on a state's taxing jurisdiction even before that was for-

⁵⁸ See opinion of Mr. Justice Field in *State Tax on Foreign Held Bonds* (Cleveland, P. & A. R. Co. v. Pennsylvania) 15 Wall. 300, 21 L.Ed. 179.

⁵⁹ *Hays v. Pacific Mail S. S. Co.*, 17 How. 596, 15 L.Ed. 254.

⁶⁰ This conception is implicit in the reasoning of Mr. Justice Field in *State Tax on Foreign Held Bonds* (Cleveland, P. & A. R. Co. v. Pennsylvania), 15 Wall. 300, 21 L.Ed. 179.

mally based upon a provision of the federal Constitution.⁶¹ The most significant developments on the law of a state's jurisdiction to tax have, however, occurred since the due process clause of the Fourteenth Amendment became the formal basis thereof. It then became a problem of federal constitutional law which has been shaped almost wholly by the decisions of the Supreme Court of the United States.

The Fourteenth Amendment prohibits a state from depriving any person of property without due process of law. The existing law governing a state's jurisdiction to tax represents the results of a judicial interpretation of that provision. It is a mere truism that no tax liability arises when a state attempts to tax subjects outside its jurisdiction to tax. This, however, gives no indication as to how to determine what is thus outside of its taxing jurisdiction. The principles which the Supreme Court has thus far laid down have not been made to depend upon whether the taxpayer (including the decedent in the case of inheritance and estate taxes) was a citizen of the United States, an alien resident, or a non-alien resident. That Court has, however, in several cases distinguished the scope of the due process clause of the Fifth Amendment as a limit on the federal power to tax from that of the due process clause of the Fourteenth Amendment as a limit on a state's jurisdiction to tax. It has stated that, whereas the taxing power of a state encounters that of other states at its borders, there is no such limitation upon the national power.⁶² This has led a few state courts to adopt the position that the due process clause of the Fourteenth Amendment does not prohibit a state from subjecting to its inheritance tax the transfer of intangible personalty owned by an alien decedent dying domiciled in a foreign country under circumstances under which that clause would prohibit such tax in the case of a decedent dying domiciled within another of the states.⁶³ The theory implicit in these decisions is that protection of the taxing power of one state against encroachment by another state is the sole premise from which the jurisdictional limits on a state's taxing power are to be derived. It also neces-

⁶¹ See *Hays v. Pacific Mail S. S. Co.*, 17 How. 596, 15 L.Ed. 254.

612, and *Cook v. Tait*, 265 U.S. 47, 44 S.Ct. 444, 68 L.Ed. 895.

⁶² See *United States v. Bennett*, 232 U.S. 299, 34 S.Ct. 433, 58 L.Ed.

⁶³ In *re McCreery's Estate*, 220 Cal. 26, 29 P.2d 186; In *re Lloyd's Estate*, 185 Wash. 61, 52 P.2d 1269.

sarily implies that the due process clause protects an alien taxpayer who is a resident of a foreign country against arbitrary exactions through purported exercises of a state's taxing power only so far as necessary to protect the taxing power of another state having a superior claim to impose a like tax. There are many situations in which a state might tax a resident alien or a resident citizen in a wholly arbitrary manner without trenching upon the superior claims of another state to tax him or his property, such as taxing him on his realty owned in a foreign country. If the sole purpose of the due process clause is to protect the taxing power of other states, such a tax would not violate it. It is highly improbable that the due process clause will ever be construed to permit this, and almost as improbable that it will be construed to permit a state to tax an alien residing in a foreign country or dying domiciled therein on any more onerous basis than that applicable to a resident citizen, a resident alien, or one dying domiciled within it. The reasoning employed by the Supreme Court in developing the jurisdictional limits on a state's taxing power support the view that the desire to protect taxpayers against arbitrary exercises of power has been as important a factor in shaping this part of our law as the desire to protect one state against another's purported exercise of its power. The natural scope of the principles thus far developed need not, therefore, be limited by the implications of a part only of the reasoning on which they are based.

Taxation of Persons

There is no universally accepted definition of a personal tax. It will be used herein to denote a tax levied on a person as such, the liability for which arises independently of his ownership of property, his receipt of income, his exercise of any privilege, or his engaging in any activity within the taxing state. The poll tax is the typical tax of this character. A state's jurisdiction to impose a poll tax on persons domiciled within it, or on residents, has been universally recognized. The principal jurisdictional problem has been to define what factors other than domicile or residence confer power upon a state to levy such a tax. The decisions of the Supreme Court throw but little light on this matter. It has been established that the due process clause of the Fifth Amendment is not violated by a poll tax levied by an organized territory of the United States upon a non-resident temporarily present within the territory for the purpose of work-

ing therein.⁶⁴ It is certain that the due process clause of the Fourteenth Amendment will not be held to prohibit a state from imposing such tax under similar circumstances. There are no other authoritative decisions as to the character and duration of the presence which will be held a proper basis for a personal tax imposed by a state upon a non-resident. In the case last cited the Court referred in its reasoning to the fact that the taxpayer was not merely in transit through the territory nor a tourist or sightseer, but one who had been employed within it for a considerable period during which he had enjoyed the protection and been within the jurisdiction of the territorial government. It is quite probable that the factors the absence of which were thus expressly referred to indicate factors the existence of which would have negatived the territory's power to impose the tax in question. The same factors would also define the constitutional limits on a state's power to impose a personal tax on non-residents.⁶⁵ It is implicit in this position that the due process clause of the Fourteenth Amendment would prevent a state from levying a tax on the person of a non-resident who was not present within it when the purported liability arose.⁶⁶ In the case last cited the Court also expressly stated that the territory imposing the poll tax made no attempt to reach something beyond its borders. It is within the limits of legitimate legal inference that the tax in that case would have been held invalid if levied upon a non-resident not present within the territory when the tax liability accrued. It may, therefore, be taken as established that a state has jurisdiction to impose a tax on a person only if that person is present within it at the time the tax accrues; that the requisite presence must meet certain requirements with respect to both duration and purpose; that presence as an incident to transit through a state or as a sightseer furnishes no basis for such a tax; that presence for a considerable period for purposes of employment or transacting business is a sufficient jurisdictional basis for such tax; that residence or domicile jus-

⁶⁴ *Haavik v. Alaska Packers' Ass'n*, 263 U.S. 510, 44 S.Ct. 177, 68 L.Ed. 414.

⁶⁵ The commerce clause would prevent a state from imposing a poll tax upon persons whose only relation to it was that they were in interstate transit through it.

⁶⁶ This problem bears some analogy to that of a state's power to impose a personal liability upon a non-resident for taxes validly imposed upon his property situated within the taxing state; see *Dewey v. Des Moines*, 173 U.S. 193, 19 S.Ct. 379, 43 L.Ed. 665, and *Nickey v. State of Mississippi*, 292 U.S. 393, 54 S.Ct. 743, 78 L.Ed. 1323.

tifies the levy of such tax; and that no very definite principles have yet been formulated (other than those implicit in the foregoing) for determining the duration and purposes that will make presence an adequate jurisdictional basis for a tax of this character.

Property Taxes—Tangible Property

The term "property taxes" will be used herein to denote taxes imposed directly upon property or upon a person because of his ownership thereof. It will not include those levied upon another tax subject measured by property, such, for example, as a corporate franchise tax measured by assets. The jurisdiction of a state to impose property taxes can be most conveniently considered by classifying such taxes into those levied upon tangible real property and interests therein, those levied upon tangible personal property and interests therein, and those levied upon intangible real or personal property and interests therein. The broad constitutional rule defining a state's jurisdiction to tax property can be stated in the same terms for all of the foregoing classes of property tax. It is that a state can tax only such property as has its situs within it. The importance of the concept of situs in this field demands an explanation of its character and content. It does not denote any definite and ascertainable objective fact or group of facts. A decision that given property has a situs within a certain state is not the affirmation of a fact but the formulation of a legal conclusion. The important problems are those of ascertaining the factors on whose existence that conclusion is dependent and of discovering the kind of considerations that influence courts in reaching it. It offers, however, a valuable tool in formulating the constitutional problems of a state's jurisdiction to tax property and in stating the answers. Its use in any other manner is based on an erroneous view of its character and function.⁶⁷

The state in which tangible real property is physically located is the only one in which it has a situs for purposes of its taxa-

⁶⁷ For a statement of the nature of the concept "situs" along the lines set forth in the text, see the opinion of Mr. Justice Stone in *First Bank Stock Corporation v. State of Minnesota*, 301 U.S. 234, 57 S.Ct. 677, 81 L.Ed. 1061, 113 A.L.R. 228. The term "situs" is sometimes

used to denote physical location only. The expression "actual situs" is sometimes also used to denote that. See opinions of Mr. Justice Stone and Mr. Justice Sutherland in *First Nat. Bank of Boston v. Maine*, 284 U.S. 312, 52 S.Ct. 174, 76 L.Ed. 313, 77 A.L.R. 1401.

tion. That state may tax it or any legal or equitable interest therein, regardless of the residence or domicile of the owner of such property or interest.⁶⁸ It is also the only state that may tax either the property or an interest therein. It has, accordingly, been held that the state of the domicile of the holder of certificates evidencing an equitable interest in real property situated in another state could not validly tax that interest to its owner.⁶⁹ The same principle would extend to every recognized legal or equitable interest in tangible real property. It has not yet been authoritatively determined whether there is, in this connection, any limit to the power of the state in which such property is located to define what shall create an interest therein, or to that of a state to treat an interest in tangible real property situated in another as personal property for purposes of taxing it to a resident owner thereof. The necessary result of these principles as thus far developed has been to limit to a single state the taxation of any given legal or equitable interest in tangible real property. They do not, however, insure that the same economic value shall not be taxed more than once in that state.

A state's jurisdiction to tax tangible personal property is also limited to that which has its situs within the state. It may tax that, and that only.⁷⁰ The determination of the situs of such property is, however, a much more complicated matter than that of fixing the situs of tangible realty. The principles governing it rest on the fundamental assumption that all property has a situs for tax purposes. This situs may, in the case of tangible personalty, be based upon either the physical location of the particular property that is being taxed, the habitual employment of certain kinds of property within a state, or the domicile of the owner of the property within a state. It is only the domiciliary state that can derive any jurisdiction to tax such property on the last basis, and it cannot tax on that basis if the property has acquired a situs outside the state based on its physical location there.⁷¹ It has not yet been determined how far the domiciliary state may tax particular property of a resident owner if

⁶⁸ *Savings & Loan Soc. v. Multnomah County*, 169 U.S. 421, 18 S.Ct. 392, 42 L.Ed. 803.

⁶⁹ *Senior v. Braden*, 295 U.S. 422, 55 S.Ct. 800, 79 L.Ed. 1520, 100 A.L.R. 794.

⁷⁰ *Delaware, L. & W. R. Co. v.*

Pennsylvania, 198 U.S. 341, 25 S.Ct. 669, 49 L.Ed. 1077; *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 26 S.Ct. 36, 50 L.Ed. 150, 4 Ann.Cas. 493.

⁷¹ *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 26 S.Ct. 36, 50 L.Ed. 150, 4 Ann.Cas. 493.

it belongs to that class the habitual employment of which in another state or country subjects it to taxation by such other state or country.⁷² The domiciliary state may tax tangible personalty that has acquired no taxable situs outside of it even though it has never been physically present within the state and is of such character that its presence there is a physical impossibility. This has been decided in the case of ocean going vessels owned by a corporation domiciled in a state into which they could not have come.⁷³ The power of a domiciliary state to tax on the basis of domicile exists only if the property in question has not acquired a situs outside the state based on factors that establish such situs there. It has the same power to tax tangible personalty on the basis of its physical location therein or its habitual use therein as does a non-domiciliary state. It may not tax tangible personalty permanently without the state merely because the documents of title thereto are permanently held within it.⁷⁴

The only bases on which a non-domiciliary state can acquire jurisdiction to tax tangible personal property are its physical location within the state or its habitual employment therein. It is essential in order to found situs on physical location that the property be present within the state. It does not, however, acquire such situs merely because of its presence in a state. Presence as an incident to transit through a state does not give the property a situs therein.⁷⁵ The presence of a ship in a port of a state as an incident to a voyage or for purposes of undergoing repairs will not alone give that ship a taxable situs in that state.⁷⁶ The permanent presence of tangible personalty within a state gives it a situs therein.⁷⁷ It has been held by several state courts that a non-domiciliary state may tax such property brought into it for use on a construction job since it would be present therein for an indefinite period even if not permanently.⁷⁸ It must be

⁷² This matter will be further considered when discussing the taxation of railroad cars.

⁷³ *Southern Pac. Co. v. Commonwealth of Kentucky*, 222 U.S. 63, 32 S.Ct. 13, 56 L.Ed. 96.

⁷⁴ *Selliger v. Commonwealth of Kentucky*, 213 U.S. 200, 29 S.Ct. 449, 53 L.Ed. 761.

⁷⁵ *Morgan v. Parham*, 16 Wall. 471, 21 L.Ed. 303.

⁷⁶ *Hays v. Pacific Mail S. S. Co.*, 17 How. 596, 15 L.Ed. 254.

⁷⁷ *Old Dominion S. S. Co. v. Virginia*, 198 U.S. 299, 25 S.Ct. 686, 49 L.Ed. 1059, 3 Ann.Cas. 1100.

⁷⁸ *Griggsby Const. Co. v. Freeman*, 108 La. 435, 32 So. 390, 58 L.R.A. 349; *National Dredging Co. v. State*, 99 Ala. 462, 12 So. 720. See contra, dissenting opinion in *Gromer v. Standard Dredging Co.*, 224 U.S. 302, 32

considered a still unsettled problem what must be the duration of the presence of tangible personalty within a non-domiciliary state in order to give it a taxable situs therein, and whether the purpose for which it is present therein is a factor in deciding the issue of its situs. The probable answer to the latter of these questions is that the purpose of the presence of the property will be held a factor in determining the issue of its situs.

There are certain types of tangible personalty that are constantly moving from state to state. Ships, railroad cars, busses and trucks are the leading examples. The courts have considered the jurisdictional problem especially with respect to ships and railroad cars. The early view that the situs of ships was at their port of registry⁷⁹ has been supplanted by applying to them the same principles governing the situs of other forms of tangible property. The state of the port of registry acquires no jurisdiction to tax them by virtue of that fact.⁸⁰ They are taxable by a state in which they are permanently employed on the basis of their permanent physical location therein,⁸¹ or by the state of their owner's domicile if they have acquired no situs elsewhere.⁸² It has never yet been decided that they acquire a situs in a state merely because a port within it is one of the termini of their regularly established route or a port of regular call. The status of the law relative to the taxation of railroad cars is not wholly clear. The state of their owner's domicile may tax any cars that have not acquired a taxable situs elsewhere,⁸³ but may not tax those that have acquired a situs elsewhere.⁸⁴ One problem has been to determine what facts will establish their situs in a non-domiciliary state. The permanent or indefinite presence of a specific car therein will give it a situs

S.Ct. 499, 56 L.Ed. 801; the majority opinion did not discuss this jurisdictional point. That state of domicile can also tax such property while absent from the state on a construction job, see *Capitol Const. Co. v. City of Des Moines*, 211 Iowa 1228, 235 N.W. 476.

⁷⁹ *Hays v. Pacific Mail S. S. Co.*, 17 How. 596, 15 L.Ed. 254.

⁸⁰ *Ayer & Lord Tie Co. v. Commonwealth of Kentucky*, 202 U.S. 409, 26 S.Ct. 679, 50 L.Ed. 1082, 6 Ann. Cas. 205.

⁸¹ *Old Dominion S. S. Co. v. Virginia*, 198 U.S. 299, 25 S.Ct. 686, 49 L.Ed. 1059, 3 Ann.Cas. 1100.

⁸² *Southern Pac. Co. v. Commonwealth of Kentucky*, 222 U.S. 63, 32 S.Ct. 13, 56 L.Ed. 96.

⁸³ *People of State of New York ex rel. New York Cent. & H. R. R. Co. v. Miller*, 202 U.S. 584, 26 S.Ct. 714, 50 L.Ed. 1155.

⁸⁴ *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 26 S.Ct. 36, 50 L.Ed. 150, 4 Ann.Cas. 493.

therein.⁸⁵ This condition of affairs is seldom realized because specific cars are usually moving into and out of a state continuously. The usual situation is one in which different cars are within a state for varying periods during the tax year. The non-domiciliary state may base its power to tax railroad cars on that fact even though it cannot establish the permanent or indefinite presence within it of any specific cars. The basis of its jurisdiction is the habitual employment within it of railroad cars rather than the presence of any particular cars.⁸⁶ It is permitted to determine the amount of capital represented by cars so employed within it by any reasonable manner. A method that has been invariably sustained consists of taxing the value of that number of cars which equals the daily average number present within the state during the tax year.⁸⁷ The unit system for computing the value of the capital invested in cars and used within the state may also be employed, but its use violates due process if for any reason it produces wholly arbitrary results. Its results were held arbitrary in one case by comparing the value produced by its use with that resulting from the use of the average daily car method.⁸⁸ The point that remains uncertain is how far the taxation of cars by a non-domiciliary state affects the power of the domiciliary state to tax them. It clearly may not tax any cars that have acquired a taxable situs in another state based on their permanent or indefinite presence therein. It has been intimated that cars that have acquired a situs in a non-domiciliary state on that basis are the only cars withdrawn from the domiciliary state's taxing power.⁸⁹ This might well

⁸⁵ *Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18, 11 S.Ct. 876, 35 L.Ed. 613 (this case involved the commerce clause only, but the argument runs along lines similar to those followed when the jurisdictional problem under the due process clause is being considered).

⁸⁶ *Johnson Oil Refining Co. v. Oklahoma ex rel. Mitchell*, 290 U.S. 158, 54 S.Ct. 152, 78 L.Ed. 238. Occasional use furnishes no basis for an inference of jurisdiction to tax; *Commonwealth of Kentucky v. Union Pac. R. Co.*, 214 Ky. 339, 283 S.W. 119, 49 A.L.R. 1091 (the cars herein involved were owned by the tax-

payer but used within the state by another railroad under the usual per diem arrangement).

⁸⁷ *American Refrigerator Transit Co. v. Hall*, 174 U.S. 70, 19 S.Ct. 599, 43 L.Ed. 899; *Johnson Oil Refining Co. v. Oklahoma ex rel. Mitchell*, 290 U.S. 158, 54 S.Ct. 152, 78 L.Ed. 238.

⁸⁸ *Union Tank Line Co. v. Wright*, 249 U.S. 275, 39 S.Ct. 276, 63 L.Ed. 602.

⁸⁹ *People of State of New York ex rel. New York Cent. & H. R. R. Co. v. Miller*, 202 U.S. 584, 26 S.Ct. 714, 50 L.Ed. 1155.

permit it to tax specific cars whose presence in other states had entered into the computation of the cars habitually employed in the latter, and thus in effect subject the same tangible personalty to multi-state taxation. It would seem that the logic of the prohibition against multi-state taxation of tangible personalty would require a definition of the domiciliary state's power reflecting every basis on which a non-domiciliary state is permitted to tax property of this character. The principles developed in connection with the taxation of railroad cars are equally applicable to the taxation of motor busses and trucks.

Property Taxes—Intangible Property

The principal problems concerning the jurisdiction of a state to tax intangible property have involved intangible personalty.⁹⁰ The most convenient approach to them is to consider first the power of the state of the owner's domicile to tax it. It has never yet been decided that a state may always tax intangible personalty on the sole basis of the owner's domicile therein. It has, however, been stated that it may generally be taxed on that basis but that there is an exception thereto in favor of the state in which intangibles are kept and used.⁹¹ There have been several state decisions denying the domiciliary state the power to tax intangibles taxable in other states under principles developed by the federal Supreme Court.⁹² The claim of the domiciliary state was formerly supported by invoking the fiction that the situs of moveables is at the domicile of their owner. It has recently been predicated on the theory that its taxation of such property is justified because it protects the economic advantages that the owner derives from such property the value of which is made the measure of the tax.⁹³ The adoption of this as the ma-

⁹⁰ For a case involving a state's jurisdiction to tax an incorporeal hereditament, a ferry franchise, see *Louisville & Jeffersonville Ferry Co. v. Kentucky*, 188 U.S. 385, 23 S.Ct. 463, 47 L.Ed. 519.

⁹¹ *Wheeling Steel Corporation v. Fox*, 298 U.S. 193, 203, 56 S.Ct. 773, 80 L.Ed. 1143; *First Bank Stock Corporation v. State of Minnesota*, 301 U.S. 234, 57 S.Ct. 677, 81 L.Ed. 1061, 113 A.L.R. 228.

⁹² *Baltimore, Mayor and City Coun-*

cil of, v. Gibbs, 166 Md. 364, 171 A. 37; *Commonwealth v. Madden's Ex'r*, 265 Ky. 684, 97 S.W.2d 561.

⁹³ The completest statement of this position is found in the opinion of Mr. Justice Stone in *First Bank Stock Corporation v. State of Minnesota*, 301 U.S. 234, 57 S.Ct. 677, 81 L.Ed. 1061, 113 A.L.R. 228. See also his concurring opinion in *FARMERS' LOAN & TRUST CO. v. STATE OF MINNESOTA*, 280 U.S. 204, 50 S.Ct. 98, 74 L.Ed. 371, 65 A.L.R. 1000, *Black's Cas. Constitutional Law*, 2d,

jor premise from which to deduce the scope of the domiciliary state's jurisdiction to tax intangibles would permit it to tax them whenever the economic advantages of their ownership are for all practical purposes realized at the owner's domicile. It is not wholly certain that the Supreme Court intended to affirm that the domiciliary state would not be permitted to tax where it did not as a practical matter furnish such protection, but the probability is that it intended so to do. The principle then is one that defines both what intangibles a state can tax on the sole basis of being the domicile of the owner, and what intangibles it cannot tax on that sole basis. The correlation of jurisdiction to tax with the power of protecting the economic advantages accruing to the owner of the taxed property from his ownership thereof furnishes a more rational basis for the domiciliary state's power to tax intangibles than the legal fiction formerly invoked. The consistent application of this principle is not likely to result in many changes in the existing law on this matter.

The bases upon which a non-domiciliary state has been held to have jurisdiction to tax intangibles have been varied. The fact that a shareholder's shares represent an interest in the corporate net assets which is protected by the state of the corporate domicile has been held to give that state jurisdiction to tax the shareholder with respect to his shares.⁹⁴ A seat on an exchange represents rights and privileges exercisable in the state where the exchange is located, and may be taxed there even when owned by a non-resident.⁹⁵ The corporate excess of a foreign corporation operating within a state is taxable therein to the extent that it arises out of such business.⁹⁶ A special franchise, such as a ferry franchise, is exercisable only within the state that grants it and can be taxed in that state even though it be not that of the owner's domicile, and it is taxable only in that state.⁹⁷ The majority of the cases have involved the power of

571; opinion of Mr. Justice Holmes, *Pennsylvania*, 302 U.S. 506, 58 S.Ct. 295, 82 L.Ed. 392.

in Fidelity & Columbia Trust Co. v. City of Louisville, Ky., 245 U.S. 54, 38 S.Ct. 40, 62 L.Ed. 145, L.R.A. 1918C, 124; and his dissent in *Safe Deposit & Trust Co. of Baltimore v. Commonwealth of Virginia*, 280 U.S. 83, 50 S.Ct. 59, 74 L.Ed. 180, 67 A.L.R. 386.

⁹⁴ *Corry v. Baltimore*, 196 U.S. 466, 25 S.Ct. 297, 49 L.Ed. 566; *Schuyllkill Trust Co. v. Commonwealth of*

⁹⁵ *Rogers v. Hennepin County*, 240 U.S. 184, 36 S.Ct. 265, 60 L.Ed. 594.

⁹⁶ *Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194, 17 S.Ct. 305, 41 L.Ed. 683, opinion on rehearing in 166 U.S. 185, 17 S.Ct. 604, 41 L.Ed. 965.

⁹⁷ *Louisville & Jeffersonville Fer-*

a non-domiciliary state to tax credits whether evidenced by bonds, notes, open accounts, or mere oral promises. These may not be taxed by a state merely on the basis that the debtor is domiciled within it,⁹⁸ or that the claim is secured by property situated within it.⁹⁹ They are also not taxable by a state merely because the securities evidencing them are temporarily within it for safekeeping, even when they have been sent into it to escape taxation in another state.¹ A non-domiciliary state may, however, tax credits that have acquired a business situs within it.² They acquire such situs in a state if they arise out of, or are used in connection with, a business conducted therein.³ A credit arising out of an isolated transaction within a state does not have a business situs therein.⁴ There is another important basis on which a non-domiciliary state can base jurisdiction to tax intangibles. This basis has been developed in connection with the situation in which a corporation formally organized under the laws of one state in fact establishes its real base of operations in another state. It has been held that the latter may tax its credits and other intangibles arising within or without it from business conducted or controlled from that state, or used therein in connection with such operation or control of its business.⁵ The state is deemed to be that of such corporation's commercial domicile. It is not wholly clear whether this jurisdictional basis is a new one or a mere modification of

ry Co. v. Kentucky, 188 U.S. 385, 23 S.Ct. 463, 47 L.Ed. 519.

⁹⁸ State Tax on Foreign Held Bonds (Cleveland, P. & A. R. Co. v. Pennsylvania), 15 Wall. 300, 21 L.Ed. 179 (the Court did not rely on the due process clause). The state of the owner's domicile may tax bonds, Kirtland v. Hotchkiss, 100 U.S. 491, 25 L.Ed. 558.

⁹⁹ Northern Cent. R. Co. v. Jackson, 7 Wall. 262, 19 L.Ed. 88 (the Court did not rely on the due process clause).

¹ Buck v. Beach, 206 U.S. 392, 27 S.Ct. 712, 51 L.Ed. 1106, 11 Ann.Cas. 732.

² New Orleans v. Stempel, 175 U.S. 309, 20 S.Ct. 110, 44 L.Ed. 174.

³ Bristol v. Washington County, 177 U.S. 133, 20 S.Ct. 585, 44 L.Ed. 701; Metropolitan Life Ins. Co. v. City of New Orleans, 205 U.S. 395, 27 S.Ct. 499, 51 L.Ed. 853; Liverpool & London & Globe Ins. Co. v. Board of Assessors for the Parish of Orleans, 221 U.S. 346, 31 S.Ct. 550, 55 L.Ed. 762, L.R.A.1915C, 903; State v. Pittsburgh Plate Glass Co., 147 Minn. 339, 180 N.W. 108.

⁴ Reat v. People ex rel., 201 Ill. 469, 66 N.E. 242.

⁵ Wheeling Steel Corporation v. Fox, 298 U.S. 193, 203, 56 S.Ct. 773, 80 L.Ed. 1143; First Bank Stock Corporation v. State of Minnesota, 301 U.S. 234, 57 S.Ct. 677, 81 L.Ed. 1061, 113 A.L.R. 228.

the "business situs" basis. The former is probably the correct view.

The fact that a non-domiciliary state has jurisdiction to tax intangibles under certain conditions does not necessarily mean that the domiciliary state may not tax them. It is possible under existing decisions for both the state of the owner's domicile and that of the corporate domicile to tax corporate shares,⁶ and for a seat on an exchange to be taxed by both the state of the owner's domicile and that in which the exchange is located.⁷ Intangibles having a business situs in one state have been held taxable at their owner's domicile,⁸ despite a contrary intimation by the federal Supreme Court.⁹ There are, however, decisions that have denied the domiciliary state's power to tax intangibles taxable by another state.¹⁰ The state of the law on this matter cannot be deemed to have been definitely settled. The Supreme Court has not carried over to property taxes its aversion to multi-state inheritance taxes on the transfer of intangibles, since it has reaffirmed the earlier views permitting at least two states to tax corporate shares.¹¹ The recent emphasis on the principle that correlates jurisdiction to tax with the power to protect the owner's interest in the property being taxed is likely to result in a system permitting a considerable amount of multi-state taxation of intangibles since there are many situations in which some intangibles may derive protection from more than one state.

Property Taxes—Unit Rule

The problem of the unit rule in relation to the taxation of property has already been considered in discussing the limits imposed on a state's taxing power by the commerce clause.¹²

⁶ *Hawley v. City of Malden*, 232 U.S. 1, 34 S.Ct. 201, 58 L.Ed. 477, Ann.Cas.1916C, 842 (state of owner's domicile); *Corry v. Baltimore*, 196 U.S. 466, 25 S.Ct. 297, 49 L.Ed. 566 (state of corporate domicile).

⁷ *Citizens' Nat. Bank of Cincinnati v. Durr et al.*, 257 U.S. 99, 42 S.Ct. 15, 66 L.Ed. 149 (state of owner's domicile); *Rogers v. Hennepin County*, 240 U.S. 184, 36 S.Ct. 265, 60 L.Ed. 594 (state of location of exchange).

⁸ *Newark Fire Ins. Co. v. State*

Board of Tax Appeals, 118 N.J.L. 525, 193 A. 912.

⁹ *Wheeling Steel Corporation v. Fox*, 298 U.S. 193, 203, 56 S.Ct. 773, 80 L.Ed. 1143.

¹⁰ *Commonwealth v. Appalachian Electric Power Co.*, 159 Va. 462, 166 S.E. 461.

¹¹ *Schuylkill Trust Co. v. Commonwealth of Pennsylvania*, 302 U.S. 506, 58 S.Ct. 295, 82 L.Ed. 392.

¹² See Chapter 9, Sections 166, 167.

The previous discussion was restricted to property used in the conduct of interstate commerce. The majority of cases then considered also involved the claim that the systems of taxation involved therein violated the jurisdictional limits imposed on a state's taxing power by the due process clause of the Fourteenth Amendment. The analysis and reasoning employed by the courts in defining the limits within which the unit rule could be applied without violating the commerce clause were practically the same as those employed by them in defining the limits of its use consistently with the requirements of the due process clause. The principles are the same when property not used in interstate commerce is involved. Their restatement will, accordingly, be dispensed with.¹³

Property Taxes—Property Held in Trust

There exist in property held in trust both the legal estate of the trustee and the equitable interest of the beneficiary. The law of taxation may validly treat each of these as distinct property interests separately taxable. The due process clause does not prohibit such multiplication of taxable wealth without a concomitant increase of actual wealth.¹⁴ The jurisdiction of a state to tax the legal interest of the trustee is governed by the same principles that would apply were the property not held in trust. Thus the state of the trustee's domicile may tax intangible personalty held in trust even though the trust was created by a resident of another state.¹⁵ The state of the settlor's domicile acquires no jurisdiction to tax merely because of that fact.¹⁶ The fact that a beneficiary is domiciled within a state confers upon it no jurisdiction to tax the corpus of the trust,¹⁷ nor does that

¹³ See, in addition to the cases on this problem which are cited in footnotes 41 to 48, inclusive, pp. 338-341, in Chapter 9, the following: *Southern R. Co. v. Commonwealth of Kentucky*, 274 U.S. 76, 47 S.Ct. 542, 71 L.Ed. 934; *Chicago, I. & L. R. Co. v. Lewis*, D.C., 12 F.2d 802; *State ex rel. Attorney General v. Lion Oil Refining Co.*, 171 Ark. 209, 284 S.W. 33.

¹⁴ The same results occur from the simultaneous taxation of corporate shares to the shareholder and the corporate property to the corporation, whether by the same or

different states. The statement in the text is supported by the implications of the decision and reasoning in *Paddell v. City of New York*, 211 U.S. 446, 29 S.Ct. 139, 53 L.Ed. 275, 15 Ann.Cas. 187.

¹⁵ *Welch v. City of Boston*, 221 Mass. 155, 109 N.E. 174, Ann.Cas. 1917D, 946.

¹⁶ *City of Augusta v. Kimball*, 91 Me. 605, 40 A. 666, 41 L.R.A. 475.

¹⁷ *Brooke v. City of Norfolk*, 277 U.S. 27, 48 S.Ct. 422, 72 L.Ed. 767.

fact coupled with the fact that the settlor is or was domiciled therein give the state power to tax the corpus.¹⁸ The fact that the beneficiary is domiciled within it gives a state jurisdiction to tax his equitable interest where the trust res consists of intangible personalty¹⁹ but not where it consists of tangible realty.²⁰ The real reasons for the latter decision should make its rule govern the case in which the trust res consists of tangible personalty, but this has not yet been authoritatively determined. The power of a state other than that of the beneficiary's domicile to tax his interest is a matter on which the decisions are practically non-existent. It is not improbable that this problem may be worked out from the premise that the beneficiary's interest may be localized wherever the trust res has its situs.

Inheritance and Estate Taxes

The subject of an inheritance tax is the exercise of the privilege of succession to property on the owner's death although most inheritance tax laws also tax the acquisition of property by certain types of inter vivos transfers. The subject of an estate tax is the exercise by an owner of property of the privilege of transferring it at death or having it disposed of under the laws of intestate succession, although estate tax acts usually include in the decedent's gross estate property of which he has disposed during his life time by certain types of transfer. The power of a state to impose these taxes is limited by the due process clause of the Fourteenth Amendment to cases in which the privilege that is taxed is exercised within it.²¹ The privilege of transferring, or succeeding to, property has in general been held to be exercised in the state in which the property involved has its situs at the time the privilege is exercised. The time has usually been held to be that of the death of the transferor in connection with taxes of the type now being considered. The nature of the problem of determining the situs of the property is in general similar to that involved in defining the jurisdiction of a state to impose property taxes. The only state having jurisdiction to

¹⁸ *Safe Deposit & Trust Co. of Baltimore v. Commonwealth of Virginia*, 280 U.S. 83, 50 S.Ct. 59, 74 L.Ed. 180, 67 A.L.R. 386.

¹⁹ *Hunt v. Perry*, 165 Mass. 287, 43 N.E. 103; *City of St. Albans v. Avery*, 95 Vt. 249, 114 A. 31.

²⁰ *Senior v. Braden*, 295 U.S. 422,

55 S.Ct. 800, 79 L.Ed. 1520, 100 A.L.R. 794.

²¹ See concurring opinion of Mr. Justice Stone in *FARMERS' LOAN & TRUST CO. v. STATE OF MINNESOTA*, 280 U.S. 204, 50 S.Ct. 98, 74 L.Ed. 371, 65 A.L.R. 1000, *Black's Cas. Constitutional Law*, 2d, 571.

subject the transfer of tangible realty, or interests therein, to inheritance taxes²² is that in which it is situated.²³ It was for long held in many states that the state of the decedent's domicile could levy an inheritance tax upon the transfer of all of his tangible personalty, including that having a permanent situs in other states. This position was based either on the theory that the situs of such property was at its owner's domicile or on the theory that that state's law determined the method of its devolution on its owner's death. It was finally authoritatively settled that the state of decedent's domicile may not levy an inheritance tax on the transfer of that part of his tangible personalty having a situs outside it.²⁴ Whether it has such situs outside that state is determined by the same principles that govern that matter in connection with property taxes. The state in which such property has a situs under those principles may subject its transfer to an inheritance tax.²⁵ The domiciliary state has the power to impose inheritance taxes on the same basis as does a non-domiciliary state, and on the additional basis of domicile with respect to such tangible personalty as has not acquired a situs elsewhere. The presently prevailing law permits but one state to levy an inheritance tax upon the transfer of a given legal interest in tangible real and personal property.

²² The subsequent discussion will refer to inheritance taxes only. The principles, however, are to be taken as applicable also to estate taxes.

²³ State courts have at times invoked the fiction of equitable conversion as a basis for levying inheritance taxes upon the transfer of tangible realty situated in another state; *Land Title & Trust Co. v. South Carolina Tax Commission, Inheritance Tax Division*, 131 S.C. 192, 126 S.E. 189. The federal Supreme Court has not passed on this issue, but would undoubtedly hold it invalid. The transfer of long term leases on lands situated outside the state of decedent's domicile has been held not taxable by state of domicile; *In re Craver's Estate*, 319 Pa. 282, 179 A. 606.

²⁴ *FRICK v. COMMONWEALTH OF PENNSYLVANIA*, 268 U.S. 473, 45 S.Ct. 603, 69 L.Ed. 1058, 42 A.L.R.

316, *Black's Cas. Constitutional Law*, 2d, 566. The opinion in this case rejects both of the theories on which the contrary rule was formerly supported.

²⁵ *City Bank Farmers' Trust Co. v. Schnader*, 293 U.S. 112, 55 S.Ct. 29, 79 L.Ed. 228. See same case for discussion of facts on which a non-domiciliary state may predicate the situs of tangible personalty therein. No satisfactory method has yet been discovered to prevent the multistate inheritance taxation of intangibles resulting from the courts of more than one state finding the same person dying domiciled within their states. See on this point *Worcester County Trust Co. v. Long*, D. C., 14 F.Supp. 754; reversed, *Riley v. Worcester County Trust Co.*, 89 F.2d 59; reversal affirmed, *Worcester County Trust Co. v. Riley*, 302 U. S. 292, 58 S.Ct. 185, 82 L.Ed. 268.

The levy of inheritance taxes by more than one state upon the transfer of intangible personalty was for a long time permitted under the decisions of the federal Supreme Court. This position was reversed by it in an important series of decisions commencing with that of *Farmers' Loan & Trust Co. v. Minnesota*.²⁶ The principal reasons for the reversal were the desire to avoid the unfavorable political, social and economic consequences of the multi-state taxation of the transfer of intangibles and the injustice to which the previous system subjected taxpayers. The principles that have been applied in every case decided by the Supreme Court since the decision last referred to have been that but one state may tax the transfer of intangibles and that the state permitted to impose the tax is that of the decedent's domicile. They have been applied to prevent a non-domiciliary state from taxing the transfer of bonds on the basis of the debtor being domiciled within it,²⁷ of unsecured notes on the same basis,²⁸ of credits evidenced by open accounts on the same basis,²⁹ of secured and unsecured notes on the basis of their presence within it for safe-keeping,³⁰ and of secured notes on the basis that the security had its situs within it.³¹ The state of the corporate domicile has been denied the power to tax the transfer of corporate shares merely on the basis of such domicile, although it was admitted to have the power to impose a slight tax on the actual transfer thereof on the corporate books.³² State courts

²⁶ 280 U.S. 204, 50 S.Ct. 98, 74 L. Ed. 371. This case expressly overruled *Blackstone v. Miller*, 188 U.S. 189, 23 S.Ct. 277, 47 L.Ed. 439.

²⁷ *FARMERS' LOAN & TRUST CO. v. STATE OF MINNESOTA*, 280 U.S. 204, 50 S.Ct. 98, 74 L.Ed. 371, 65 A.L.R. 1000, *Black's Cas. Constitutional Law*, 2d, 571.

²⁸ *Baldwin v. State of Missouri*, 281 U.S. 586, 50 S.Ct. 436, 74 L.Ed. 1056, 72 A.L.R. 1303.

²⁹ *Beidler v. South Carolina Tax Commission*, 282 U.S. 1, 51 S.Ct. 54, 75 L.Ed. 131.

³⁰ *Baldwin v. State of Missouri*, 281 U.S. 586, 50 S.Ct. 436, 74 L.Ed. 1056, 72 A.L.R. 1303. This probably overrules *Wheeler v. Sohmer*, 233 U.S. 434, 34 S.Ct. 607, 58 L.Ed. 1030

(sustaining power to tax of a non-domiciliary state in which securities were permanently kept for safe-keeping).

³¹ *Baldwin v. State of Missouri*, 281 U.S. 586, 50 S.Ct. 436, 74 L.Ed. 1056, 72 A.L.R. 1303.

³² *First Nat. Bank of Boston v. State of Maine*, 284 U.S. 312, 52 S.Ct. 174, 76 L.Ed. 313, 77 A.L.R. 1401. This overruled that part of the decision in *Frick v. Commonwealth of Pennsylvania*, 268 U.S. 473, 45 S.Ct. 603, 69 L.Ed. 1058, 42 A.L.R. 316, which had in effect held not only that said state could tax but also that its right to do so was superior to that of the decedent's domicile. The principles of the principal case have been extended to certificates of beneficial interest in a business

have gone even further and denied a non-domiciliary state the power to tax the transfer of securities placed in trust therein by a non-resident settlor.³³

The Supreme Court has not yet definitely determined since it decided this line of cases under what circumstances it will sustain the jurisdiction of a non-domiciliary state to tax the transfer of intangibles. It had prior thereto held that the state of the decedent's domicile could not tax his exercise of a power relating to intangibles held in trust in another state.³⁴ Its recent decisions do not require any modification of that doctrine. It has expressly stated that none of those recent decisions related to intangibles with a business situs in a non-domiciliary state. It is not improbable that it will limit the taxation of their transfer to the state of their business situs. If the interest of a non-resident decedent in a partnership is held to be an intangible having a business situs in the state in which the partnership is organized and operates, this would require a reversal of an existing decision permitting its transfer to be taxed by the state of the deceased partner's domicile.³⁵ The Court has more recently permitted multi-state property and income taxes. It may be that future decisions involving inheritance taxes will permit more than a single state to tax the transfer of intangibles if they bear to more than one state a legal relation such that the economic interest represented by them receives the protection of more than a single state.³⁶ The due process clause as presently construed, however, protects the transfer of intangibles against taxation by more than a single state.

trust; *In re Kennedy's Estate*, 186 Minn. 160, 242 N.W. 697. A state may not tax the transfer of corporate shares merely on the basis that the corporation has assets within it, even on a valuation based on those assets; *Rhode Island Hospital Trust Co. v. Doughton*, 270 U.S. 69, 46 S.Ct. 256, 70 L.Ed. 475, 43 A.L.R. 1374.

³³ *In re Frank's Estate*, 192 Minn. 151, 257 N.W. 330, 96 A.L.R. 667.

³⁴ *Wachovia Bank & Trust Co. v. Doughton*, 272 U.S. 567, 47 S.Ct. 202, 71 L.Ed. 413. Cf. *In re Simond's Estate*, 188 Wash. 211, 61 P.2d 1302. The mere fact that the trustee was

domiciled in the state was held to give that state no power to tax the exercise of a power by a non-resident decedent where the trust had been established under the will of a decedent dying domiciled in another state; *In re Sandford's Estate*, 277 N.Y. 323, 14 N.E.2d 374.

³⁵ *Blodgett v. Silberman*, 277 U.S. 1, 48 S.Ct. 410, 72 L.Ed. 749.

³⁶ See concurring opinion of Mr. Justice Stone in *FARMERS' LOAN & TRUST CO. v. STATE OF MINNESOTA*, 280 U.S. 204, 50 S.Ct. 98, 74 L.Ed. 371, 65 A.L.R. 1000, *Black's Cas. Constitutional Law*, 2d, 571.

The inclusion of certain inter vivos transfers among those subject to inheritance taxation has raised several variations of the jurisdictional problem that do not arise in the case of transfers by will or under the laws of intestate succession. If the property transferred is tangible realty the state of its location is the only one that may tax its transfer regardless of the domicile of the transferor at either the time of the transfer or of his death. There has been found no case definitely deciding the rule where the transferred property consists of tangible personality. It has been held that in the case of intangible personality the tax may be imposed by the state which was that of the transferor's domicile at the time both of the transfer and of the transferor's death even though the legal title to the property was in a trustee domiciled in another state at both those times.³⁷ The principal argument used was that the matter was governed by the status of affairs at the time of the transfer. It has also been held that the state of the trustee's domicile had no jurisdiction to tax in the situation last described.³⁸ There is, however, a decision that the state of the transferor's domicile at the time of his death may tax even though the transfer was made in another state while he was domiciled therein and which was also the state of the trustee's domicile at the date of the transferor's death,³⁹ but another state court arrived at the opposite conclusion under such state of facts.⁴⁰ There is nothing in the decisions to indicate whether the terms of the transfer affect the result in the cases of these inter vivos transfers. The possibility of multi-state inheritance taxation of these transfers exists if all the extant decisions be accepted. The federal Supreme Court has not passed on the matter since its epoch-making decisions a few years ago.

A state that is without jurisdiction to levy an inheritance tax on a transfer under the principles heretofore discussed is not permitted to circumvent this restriction by using the value of the property that is beyond its jurisdiction as the measure of the tax on the transfer of assets within its taxing power.⁴¹ It

³⁷ *Keeney v. Comptroller of State of New York*, 222 U.S. 525, 32 S.Ct. 105, 56 L.Ed. 299, 38 L.R.A.,N.S., 1139.

³⁸ *In re Frank's Estate*, 192 Minn. 151, 257 N.W. 330, 96 A.L.R. 667.

³⁹ *Hackett v. Bankers' Trust Co.*, 122 Conn. 107, 187 A. 653.

⁴⁰ *In re Brown's Estate*, 274 N.Y. 10, 8 N.E.2d 42.

⁴¹ *FRICK v. COMMONWEALTH OF PENNSYLVANIA*, 268 U.S. 473, 45 S.Ct. 603, 69 L.Ed. 1058, 42 A.L.R. 316, *Black's Cas. Constitutional Law*, 2d, 566.

is not always easy to determine when a state is attempting to do this.⁴²

Income Taxes

The jurisdiction of a state to levy income taxes can be most readily discussed by first considering the power of a state other than that of the domicile of the recipient of the income. A state may tax the income received by a non-resident from sources within it,⁴³ and it may not tax him on income that is not from such local sources.⁴⁴ The principal jurisdictional problem has been to define the principles for determining that income. It includes earnings from the performance of labor or personal services within the state,⁴⁵ and also that derived from the use of, or dealings in, any property having its situs within it.⁴⁶ The interest paid by a resident debtor to a non-resident creditor cannot be taxed unless the credit has a business situs within the state.⁴⁷ The gain derived from the sale of a seat on a stock exchange located within a state may be taxed to the non-resident owner since the seat has a taxable situs within the state.⁴⁸ The decisions thus far rendered show a judicial tendency to determine whether property has its situs within a nondomiciliary state for income tax purposes by the principles applied in defining such state's jurisdiction to impose property taxes upon such property.

The income derived by non-residents from business conducted within it may be taxed by a state. Sales made within it from an office maintained therein constitute business conducted within it,⁴⁹ but it has been held that the income from sales made within a state by filling from without it orders taken therein by salesmen could not be constitutionally taxed by a non-domiciliary

⁴² See *Maxwell v. Bugbee*, 250 U.S. 525, 40 S.Ct. 2, 63 L.Ed. 1124; *In re Lagergren's Estate*, 276 N.Y. 184, 11 N.E.2d 722.

⁴³ *SHAFFER v. CARTER*, 252 U.S. 37, 40 S.Ct. 221, 64 L.Ed. 445, *Black's Cas. Constitutional Law*, 2d, 581.

⁴⁴ *Hans Rees' Sons v. State of North Carolina ex rel. Maxwell*, 283 U.S. 123, 51 S.Ct. 385, 75 L.Ed. 879; *Domenech v. United Porto Rican Sugar Co.*, 1 Cir., 62 F.2d 552.

⁴⁵ *Jackling v. State Tax Commission*, 40 N.M. 241, 58 P.2d 1167.

⁴⁶ *People of State of New York ex rel. Whitney v. Graves*, 299 U.S. 366, 57 S.Ct. 237, 81 L.Ed. 285.

⁴⁷ *Domenech v. United Porto Rican Sugar Co.*, 1 Cir., 62 F.2d 552.

⁴⁸ *People of State of New York ex rel. Whitney v. Graves*, 299 U.S. 366, 57 S.Ct. 237, 81 L.Ed. 285.

⁴⁹ *People ex rel. Monjo v. State Tax Commission*, 218 App.Div. 1, 217 N.Y.S. 669.

state.⁵⁰ The principal problem has, however, arisen where a non-resident conducts business both within and without a state. The general approach to this problem has been the same as that represented by the use of the "unit rule" in connection with other state taxes. Its use in connection with an income tax is subject to the same limitations that apply when used for other taxes. The non-domiciliary state may include in the "unit income" only that derived within the state and that part of the taxpayer's income from without the state which is derived from that part of the taxpayer's business of which the business within it is an integral part. If his entire venture consists of more than one business while he conducts but one business within the taxing state, the extra-state income which it may include in the "unit income" is limited to that derived from the business which the taxpayer conducts both within and without the state.⁵¹ It is further required that the formula for determining the amount of the unit income allocable to the taxing state be not arbitrary. If its application to a given case clearly allocates to the state an amount of income that does not fairly reflect the contribution of that state to the production of the total "unit income", it is invalid as applied to that case.⁵² The same formula may, however, be valid in its application to another case.⁵³ The due process clause does not require any particular allocation formula, but prohibits arbitrary results regardless of the formula used.⁵⁴ The burden is on the taxpayer to prove that the formula produces arbitrary results in his case if its application thereto is to be held invalid. It has never yet been decided that a taxpayer may insist upon a direct accounting of the net income earned within a non-domiciliary state (as distinguished from the use of an allocation formula in computing such net income), and it is not likely that this will

⁵⁰ *Curlee Clothing Co. v. Okla. Tax Commission*, 180 Okl. 116, 68 P.2d 834.

⁵¹ *Standard Oil Co., Indiana, v. Thoresen*, 8 Cir., 29 F.2d 708.

⁵² *Hans Rees' Sons v. State of North Carolina ex rel. Maxwell*, 283 U.S. 123, 51 S.Ct. 385, 75 L.Ed. 879.

⁵³ The formula held invalid as applied in the case cited in footnote 52 was held valid as applied in *Underwood Typewrite Co. v. Chamberlain*,

254 U.S. 113, 41 S.Ct. 45, 65 L.Ed. 165.

⁵⁴ See on various formulas the following: *Bass, Ratcliff & Gretton v. State Tax Commission*, 266 U.S. 271, 45 S.Ct. 82, 69 L.Ed. 282; *People of New York ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 129 N.E. 202; *Alpha Portland Cement Co. v. Commonwealth*, 244 Mass. 530, 139 N.E. 158; *Norfolk & W. Ry. Co. v. North Carolina ex rel. Maxwell*, 297 U.S. 682, 56 S.Ct. 625, 80 L.Ed. 977.

ever be held. A state has the power to prescribe methods that will prevent tax evasion through the siphoning of income to other states.⁵⁵ It may not, however, expand its power to tax foreign corporations doing business within it by imposing upon them a residence within the state. The doctrine of unconstitutional conditions prohibits it from conditioning the right to engage in local business within it upon consent to such a requirement.⁵⁶

The power of the domiciliary state to tax income has not been denied in any case on which the federal Supreme Court has thus far passed. The ultimate theory on which its opinions base its decisions is that residence entails the responsibility of sharing in the cost of government, that an income tax is an equitable method for distributing that cost, and that the duty to pay it is founded upon the protection afforded by the state to the recipient of the income in his person, in his right to receive it, and in his enjoyment of it when received.⁵⁷ It has at times supported the domiciliary state's power to tax income from property sources by basing it on the fact that the situs of the income producing property was within the state,⁵⁸ but its most recent pronouncement affirms that the source of the income does not affect the exercise of the privileges incident to residence which is the factor that prevents the tax from being considered so arbitrary as to violate due process when imposed on income from extra-state sources.⁵⁹ It has rejected the view that a tax on the income from property is one on the property and leviable only when the state could tax the property itself.⁶⁰ It has, accordingly, been held that a domiciliary state may tax the income received by a cestui from a trust established by a nonresident and administered in another state the assets of which consisted of intangible per-

⁵⁵ See *Palmolive Co. v. Conway*, D. C., 43 F.2d 226; *Buick Motor Co. v. City of Milwaukee, D.C.*, 43 F.2d 385. Neither case considered the constitutional problem.

⁵⁶ *Newport Co. v. Wis. Tax Commission*, 219 Wis. 293, 261 N.W. 884, 100 A.L.R. 1204.

⁵⁷ *Maguire v. Trefry*, 253 U.S. 12, 40 S.Ct. 417, 64 L.Ed. 739; *Lawrence v. State Tax Commission*, 286 U.S. 276, 52 S.Ct. 556, 76 L.Ed. 1102, 87 A.L.R. 374; *PEOPLE OF NEW YORK EX REL. COHN v. GRAVES*, 300 U.S. 308, 57 S.Ct. 466, 81 L.Ed.

668, *Black's Cas. Constitutional Law*, 2d, 576.

⁵⁸ *Maguire v. Trefry*, 253 U.S. 12, 40 S.Ct. 417, 64 L.Ed. 739.

⁵⁹ *PEOPLE OF NEW YORK EX REL. COHN v. GRAVES*, 300 U.S. 308, 57 S.Ct. 466, 81 L.Ed. 668, *Black's Cas. Constitutional Law*, 2d, 576.

⁶⁰ *PEOPLE OF NEW YORK EX REL. COHN v. GRAVES*, 300 U.S. 308, 57 S.Ct. 466, 81 L.Ed. 668, *Black's Cas. Constitutional Law*, 2d, 576.

sonality having no situs in the taxing state.⁶¹ That state may also tax the rent received by a resident from an interest in realty situated in another state, and the interest from bonds secured by realty in another state in which they were held by executors.⁶² It may tax income derived from business conducted without the state,⁶³ and earnings from personal services rendered in another state⁶⁴ even though these have also been taxed by the state in which they were earned.⁶⁵ It may not, however, arbitrarily create a residence for taxpayers who are in fact nonresidents.⁶⁶ Its power to tax is determined by the residence of the taxpayer at the time he receives the income sought to be taxed rather than at the time when the state attempts to levy the tax.⁶⁷ A person who becomes a resident during a tax year cannot, accordingly, be taxed on income received prior to the time when he became a resident unless the income is derived from sources within the state.⁶⁸ The same principles would determine the extent of a state's power to tax the income of one who ceases to be a resident during the tax year.⁶⁹ These limits may not be evaded by the adoption of such a formula for computing the income received during residence as indirectly effects a taxation of income beyond the state's power to tax.⁷⁰ The constitutional scope of a domiciliary state's power to tax income as defined by the foregoing principles, coupled with those defining that of a non-domiciliary state, permit multi-state taxation of the same income. The Supreme Court has expressly held that the reasons for prohibiting multi-state inheritance taxes do not apply to income taxes.⁷¹

⁶¹ *Maguire v. Trefry*, 253 U.S. 12, 40 S.Ct. 417, 64 L.Ed. 739.

Commission, 219 Wis. 293, 261 N.W. 884, 100 A.L.R. 1204.

⁶² *PEOPLE OF NEW YORK EX REL. COHN v. GRAVES*, 300 U.S. 308, 57 S.Ct. 466, 81 L.Ed. 668, *Black's Cas. Constitutional Law*, 2d, 576.

⁶⁷ *Hart v. Tax Commissioner*, 240 Mass. 37, 132 N.E. 621.

⁶⁸ *Kennedy v. Commissioner of Corporations and Taxation*, 256 Mass. 426, 152 N.E. 747.

⁶³ *Lawrence v. State Tax Commission*, 286 U.S. 276, 52 S.Ct. 556, 76 L.Ed. 1102.

⁶⁹ See discussion in *Scobie v. Wisconsin Tax Commission*, 225 Wis. 529, 275 N.W. 531.

⁶⁴ *Dromey v. Wisconsin Tax Commission*, Wis., 278 N.W. 400.

⁷⁰ *Greene v. Wisconsin Tax Commission*, 221 Wis. 531, 266 N.W. 270.

⁶⁵ *Hughes v. Wisconsin Tax Commission*, Wis., 278 N.W. 403.

⁷¹ *People of State of New York ex rel. Cohn v. Graves*, 300 U.S. 308, 57 S.Ct. 466, 81 L.Ed. 668, 108 A.L.R. 721.

⁶⁶ *Newport Co. v. Wisconsin Tax*

Franchise and Excise Taxes

The term "franchise tax" is used herein to denote a tax on the grant to, or exercise by, a corporation of the privilege of being a corporation or acting in corporate form. It does not include a property tax levied upon that privilege considered as a form of property. A state may impose a franchise tax upon the privilege of domestic corporations to exist, or to transact business within it. Its power to impose a franchise tax upon foreign corporations (herein used to denote those organized under the laws of any state or country other than the taxing state) exists only with respect to privileges exercised by them within it. It may not, therefore, subject to a gross premium tax a foreign insurance company after it has ceased to do business within it by taxing premiums thereafter paid directly to the company's office outside the state under policies written within the state while the company was doing business therein.⁷² Nor may it include premiums received by a foreign corporation still engaged in business within it where those are received under a reinsurance contract entered into and to be performed without the state, even though the contract relates to policies written within the state by the other party to the reinsurance contract.⁷³ A state's power to impose a franchise tax on a foreign corporation doing business within it has been uniformly sustained.⁷⁴ The only exceptions to its power to do so are that it may not tax the privilege of either a domestic or foreign corporation to act within it as a federal agency or instrumentality nor that of either to engage within it in interstate or foreign commerce.

The due process clause of the Fourteenth Amendment limits a state in imposing privilege taxes not only to the taxation of privileges exercised within it but also in defining the principles by which the amount of the tax may be measured in cases in which it may impose some tax. The measures usually employed are authorized or issued capital stock, assets, amount of business transacted, gross earnings, net income, or some combination of these factors. A state may not employ a measure of a franchise tax in the case of a foreign corporation if its application in effect results in the taxation of property situated, business transacted,

⁷² *Provident Sav. Life Assur. Soc. v. Commonwealth of Kentucky*, 239 U.S. 103, 36 S.Ct. 34, 60 L.Ed. 167, L.R.A.1916C, 572.

⁷³ *Conn. General Life Ins. Co. v.*

Johnson, 303 U.S. 77, 58 S.Ct. 436, 82 L.Ed. 673.

⁷⁴ *Equitable Life Assur. Soc. of the United States v. Commonwealth of Pennsylvania*, 238 U.S. 143, 35 S.Ct. 829, 59 L.Ed. 1239.

or earnings or income earned, without the state. A tax measured by total authorized capital stock violates the due process clause in every case in which the foreign corporation has property and does business outside the taxing state.⁷⁵ The position that it would be valid if the statute imposed a reasonable maximum⁷⁶ was later rejected in a case whose reasoning is practically certain to be applied generally rather than limited to its specific facts.⁷⁷ The measurement of such a tax in the circumstances above described by the total issued capital stock and surplus has also been held to violate due process,⁷⁸ and the same principles would require the same conclusion wherever the measure is the total of a factor found both within and without the state. It may, however, be validly measured by a portion of the authorized capital stock allocated to the state on the basis of assets situated, business transacted, or income derived, within it, or on any other fair basis of allocation.⁷⁹ A tax measured by an allocated fraction of the total authorized capital stock would probably be held invalid if the corporation had any property and transacted any business outside the state.⁸⁰ The use of sales made both within and without the state has been sustained as a measure for a license tax on manufacturing in the case of a foreign corporation all of whose manufacturing operations were conducted within the state.⁸¹ The measure was deemed a fair measure of the value of the privilege taxed since all the goods sold had first been manufactured within the state. The principles applied in defining a state's jurisdiction to impose property and income taxes underlie the decisions dealing with what constitutes a valid measure of a franchise tax imposed by a state upon foreign corporations trans-

⁷⁵ *West. Union Tel. Co. v. Kansas ex rel. Coleman*, 216 U.S. 1, 30 S.Ct. 190, 54 L.Ed. 355; *International Paper Co. v. Commonwealth of Massachusetts*, 246 U.S. 135, 38 S.Ct. 292, 62 L.Ed. 624, Ann.Cas.1918C, 617.

⁷⁶ *Baltic Mining Co. v. Commonwealth of Massachusetts*, 231 U.S. 68, 34 S.Ct. 15, 58 L.Ed. 127.

⁷⁷ *Cudahy Packing Co. v. Hinkle*, 278 U.S. 460, 49 S.Ct. 204, 73 L.Ed. 454.

⁷⁸ *Looney v. Crane Co.*, 245 U.S. 178, 38 S.Ct. 85, 62 L.Ed. 230.

⁷⁹ *St. Louis Southwestern R. Co. v.*

State of Arkansas ex rel. Norwood, 235 U.S. 350, 35 S.Ct. 99, 59 L.Ed. 265; *Bass, Ratcliff & Gretton v. State Tax Commission*, 266 U.S. 271, 45 S.Ct. 82, 69 L.Ed. 282; *Southern Realty Corporation v. McCallum, D. C.*, 1 F.Supp. 614, affirmed, 5 Cir., 65 F.2d 934.

⁸⁰ See *Air-Way Electric Appliance Corporation v. Day*, 266 U.S. 71, 45 S.Ct. 12, 69 L.Ed. 169 (this does not, however, decide the suggested issue).

⁸¹ *American Mfg. Co. v. City of St. Louis*, 250 U.S. 459, 39 S.Ct. 522, 63 L.Ed. 1084.

acting local business within it or exercising within it a privilege derived from the state. A state may validly measure a franchise tax imposed upon its domestic corporations by a measure that would be valid if applied to a foreign corporation, and also by some that have been held invalid as applied to foreign corporations.⁸² The tax in such cases is deemed to be on the privilege of corporate existence. The power of a state to impose an entrance fee upon a foreign corporation applying for entrance to transact a local business is at least as great as its power to impose a franchise tax on it after it has been admitted, and is generally held to be greater.⁸³ The decisions, however, do not warrant any statement as to how much greater is its power in that matter. The power of a state to levy other excise taxes, such as sales and stamp taxes, is also subject to jurisdictional limits based on the due process clause. It may impose an excise if the events or transactions on the occurrence of which the liability for a tax arises occurs within it,⁸⁴ but may not do so if they occur outside of its borders.⁸⁵

EQUALITY AND UNIFORMITY OF TAXATION

284. Classification is an unavoidable concomitant of an exercise of its taxing powers by a state. The principal provisions of the federal Constitution limiting a state in classifying for tax purposes are the due process and equal protection clauses of the Fourteenth Amendment. The provision prohibiting a state from making or enforcing a law abridging the privileges and immunities of federal citizenship has also been held to limit a state in classifying for tax purposes.
285. The general limitation imposed by these various constitutional provisions is that a classification for tax purposes must be reasonable if it is to be held valid. The tests of reasonableness are extremely numerous and varied.

⁸² *Kansas City, Ft. S. & M. R. Co. v. Botkin*, 240 U.S. 227, 36 S.Ct. 261, 60 L.Ed. 617; *Kansas City, M. & B. R. Co. v. Stiles*, 242 U.S. 111, 37 S.Ct. 58, 61 L.Ed. 176.

⁸³ *People ex rel. D. W. Griffith, Inc., v. Loughman*, 249 N.Y. 369, 164 N.E. 253; *Atlantic Refining Co. v. Commonwealth of Virginia*, 302 U.S. 22, 58 S.Ct. 75, 82 L.Ed. 24.

⁸⁴ *People of State of New York ex rel. Hatch v. Reardon*, 204 U.S. 152, 27 S.Ct. 188, 51 L.Ed. 415, 9 Ann.Cas. 736; *Graniteville Mfg. Co. v. Query*, 283 U.S. 376, 51 S.Ct. 515, 75 L.Ed. 1126.

⁸⁵ *St. Louis Cotton Compress Co. v. State of Arkansas*, 260 U.S. 346, 43 S.Ct. 125, 67 L.Ed. 297.

286. The constitutions of practically all the states contain provisions requiring some or all taxes to conform to the principles of equality, uniformity, or proportionality. These also are generally construed to permit reasonable classifications.

General Considerations

A state's tax system in fact never includes the taxation of every conceivable tax subject that is within the state's jurisdiction to tax. Classification has always been a practically inevitable concomitant of an exercise of its taxing power by a state. Its power in this matter is not, however, unlimited. The federal Constitution imposes several important restrictions thereon of which the most important are the contract clause, the interstate privileges and immunities clause, the federal privileges and immunities clause of the Fourteenth Amendment, and the due process and equal protection clauses of that Amendment. All of these limit a state in defining its taxing power in its own constitution as well as when it acts through its legislature. The constitution of every state also limits its legislature in exercising the state's taxing power. The state constitutional limitations on the power of the legislature to make classifications for tax purposes vary from state to state, but that of most of them contains some provision requiring equality and uniformity for some or all taxes, and limiting the legislature's power to create exemptions especially in levying property taxes. It is impossible to discuss all of these within the available space. The discussion will, accordingly, be mostly confined to the limitations based on the various provisions of the Fourteenth Amendment to the Federal Constitution.⁸⁶

The equal protection clause of the Fourteenth Amendment is the most important single provision of the federal Constitution limiting a state's power to classify for tax purposes. Its terms prohibit a state from denying to any person within its jurisdiction the equal protection of the laws. The problem of whether a person is within a state's jurisdiction so as to be able to invoke the protection of the clause arises most frequently in connection with entrance fees required to be paid before a foreign corporation is admitted to transact a local business within a state. The Supreme Court has never definitively decided whether such corporation is within such state's jurisdiction, but correct theory

⁸⁶ The limits imposed by the other federal Constitutional provisions referred to are discussed in other parts of the text.

would require a decision that it is not within it.⁸⁷ A foreign corporation that has been admitted and that is engaged within a state in the transaction of either interstate or local business is so far within that state's jurisdiction as to be entitled to invoke the protection of the equal protection clause.⁸⁸ A foreign corporation not doing any business within a state is within its jurisdiction with respect to any of its legal interests that can be said to be present within it,⁸⁹ and the same rule would apply to non-resident individuals.

The principal problem under the equal protection clause has been the degree of classification permitted thereby. The rule, as generally stated, is that it prohibits unreasonable classifications only. The decisions show that there exist no universally applicable tests by which to determine whether a given classification is reasonable or unreasonable. A classification on a given basis may be valid with respect to one tax and invalid with respect to another. It has, for example, been held that a classification on the basis of the corporate or non-corporate character of the taxpayer under a statute that taxed only the former on shares of stock owned by such taxpayer was valid,⁹⁰ while a classification on the same basis was held invalid in imposing a gross earnings tax on operators of taxicabs.⁹¹ The same condition prevails with respect to other bases of classification. The formal basis on which taxpayers are classified is but one of the factors considered in determining the reasonableness of the classification. The others are as numerous as the specific arguments employed by the courts to sustain the innumerable classifications on the validity of which they have passed. There are certain factors whose presence makes it practically certain that a classification will be sustained. These are ultimately based on accepted theories as to what constitute reasonable principles for distributing the tax burden. A classification for tax purposes is in effect nothing more than a legislative determination as to how that

⁸⁷ See discussion in *Atlantic Refining Co. v. Commonwealth of Virginia*, 302 U.S. 22, 58 S.Ct. 75, 82 L. Ed. 24.

⁸⁸ *Southern R. Co. v. Greene*, 216 U.S. 400, 30 S.Ct. 287, 54 L.Ed. 536, 17 Ann.Cas. 1247.

⁸⁹ *Kentucky Finance Corporation v. Paramount Auto Exchange Corporation*, 262 U.S. 544, 43 S.Ct. 636,

67 L.Ed. 1112. See also *Blake v. McClung*, 172 U.S. 239, 19 S.Ct. 165, 43 L.Ed. 432.

⁹⁰ *Ft. Smith Lumber Co. v. State of Arkansas ex rel. Arbuckle*, 251 U.S. 532, 40 S.Ct. 304, 64 L.Ed. 396.

⁹¹ *Quaker City Cab Co. v. Commonwealth of Pennsylvania*, 277 U.S. 389, 48 S.Ct. 553, 72 L.Ed. 927.

burden is to be distributed, and it is wholly proper that a court should measure the reasonableness of that determination by generally accepted theories as to the proper bases for distributing that burden. A classification that tends to distribute taxes in proportion to the benefits received from government or in accordance with the principle of ability to pay will generally be held valid.⁹² It has also been held that one that takes account of the fact that the activities of those taxed are more responsible for the need for governmental expenditures than are the activities of those exempted from the tax is reasonable and valid.⁹³ A classification reflecting differences connected with the administration of different taxes is sometimes sustained on that basis.⁹⁴ A state may also use its taxing power as an instrument of social policy, and a classification that tends to promote a policy which the state is free to adopt is often sustained on that basis.⁹⁵ The courts not only invoke considerations of these kinds, but even more frequently use more specific arguments that ultimately depend for their validity upon such theories. The application of these principles to particular cases is not a purely mechanical or logical process. The conclusion that a particular classification is reasonable is the result of a process in which general theories of the above kind, past judicial applications thereof and prevailing conceptions of fairness in distributing the tax burden all play a part. It includes also the weighing of the specific factors present in the particular classification whose validity is being considered. It should be noted in the latter connection that a decision sustaining a given classification because of the presence of certain specific factors must not be construed as one that another classification is invalid if those factors are absent in its case.⁹⁶ A judgment that a particular classification is unreason-

⁹² *Alward v. Johnson*, 282 U.S. 509, 51 S.Ct. 273, 75 L.Ed. 496, 75 A.L.R. 9.

⁹³ *Carley & Hamilton v. Snook*, 281 U.S. 66, 50 S.Ct. 204, 74 L.Ed. 704, 68 A.L.R. 194.

⁹⁴ *Mutual Benefit Life Ins. Co. v. Martin County*, 104 Minn. 179, 116 N.W. 572.

⁹⁵ *Ft. Smith Lumber Co. v. State of Arkansas ex rel. Arbuckle*, 251 U.S. 532, 40 S.Ct. 304, 64 L.Ed. 396;

Heisler v. Thomas Colliery Co., 260 U.S. 245, 43 S.Ct. 83, 67 L.Ed. 237.

⁹⁶ See *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 53 S.Ct. 481, 77 L.Ed. 929, 85 A.L.R. 699, in which it was stated that the absence therein of the special factors invoked to sustain the chain-store tax in *State Board of Tax Com'rs of Indiana v. Jackson*, 283 U.S. 527, 51 S.Ct. 540, 75 L.Ed. 1248, 73 A.L.R. 1464, 75 A.L.R. 1536, did not prevent the tax involved in the former from being held valid.

able and invalid is of the same general character as that of one that it is reasonable and valid. It should be noted that the foregoing considerations are also applicable to the problem of whether a classification conforms to the requirements of such broad state constitutional limitations as those requiring taxes to be uniform or uniform upon the same class of subjects.⁹⁷ They are not as relevant where the provision merely requires taxes to be proportionate to the value of the property taxed. It is generally held that an issue under the equal protection clause must be decided in respect of the general classification rather than by the chance incidence of the tax upon particular taxpayers.⁹⁸ A classification that is in general reasonable does not become invalid as applied to a particular case merely because it might effect an unreasonable result therein.

The equal protection and broadly phrased state uniformity clauses also require that the members of the same class shall receive equality of treatment.⁹⁹ This does not require mathematical equality but merely substantial equality of treatment. Any other rule would invalidate progressively graduated income taxes of the usual kind, but these have been almost universally sustained. The last requirement of the equal protection clause and comparable state constitutional provisions is that the difference in tax treatment between the different classes be reasonable. There is very little judicial discussion of this matter, but every decision sustaining a given classification impliedly affirms the validity of the differences in tax treatment involved therein.

There are many provisions of the federal Constitution the effect of which is to withdraw certain subjects from the scope of a state's taxing power. A classification that it is thus forced to make cannot be, and is not, held to violate the equal protection clause. Thus the exemption of a corporation engaged within the state in interstate commerce only from a franchise tax on the privilege of doing business within a state does not violate the equal protection clause since "the submission by the state to the commerce clause cannot be held to violate the equal protection

⁹⁷ *Park v. City of Duluth*, 134 Minn. 296, 159 N.W. 627; *Hilger v. Moore*, 56 Mont. 146, 182 P. 477; *Rosenbloom v. State*, 64 Neb. 342, 89 N.W. 1053, 57 L.R.A. 922.

56 S.Ct. 252, 80 L.Ed. 299, 102 A.L.R. 54.

⁹⁹ *Mutual Benefit Life Ins. Co. v. Martin County*, 104 Minn. 179, 116 N.W. 572.

⁹⁸ *Colgate v. Harvey*, 296 U.S. 404,

clause."¹ The same principle permits a state to make any classifications required to adjust its taxing system to any other restrictions imposed by the federal Constitution or valid federal legislation.² It is a question for each state to determine whether such adjustment conflicts with any provision of its own constitution. It has been held that a state constitutional provision requiring uniform taxation is violated by taxing state banks as long as the state is prevented from similarly taxing national banks because of a conflict between its law and the federal statute defining the extent of its power to tax national banks.³ The contrary view has also been affirmed,⁴ and is clearly the more reasonable.⁵

Tax Classifications

The general principles governing the power of a state to classify for tax purposes have been applied in connection with practically every known form of tax. The federal Supreme Court has seldom held invalid any classification made in connection with the levying of property taxes. It has sustained the levy of a heavier burden of taxation upon motor vehicles using the public highways than that levied upon other forms of property,⁶ and the imposition of a heavier tax upon oil than upon other property.⁷ The equal protection clause does not prohibit the levy of a tax on ores which is not imposed upon similar interests in quarries, forests and other forms of wasting asset,⁸ nor even the imposition of a tax upon anthracite that is not levied upon bituminous coal.⁹ A statute providing for the assessment of one type of intangible at its actual value while other intangibles are as-

¹ *Matson Nav. Co. v. State Board of Equalization of California*, 297 U.S. 441, 56 S.Ct. 553, 80 L.Ed. 791.

² *Union Bank & Trust Co. v. Phelps*, 288 U.S. 181, 53 S.Ct. 321, 77 L.Ed. 687, 83 A.L.R. 1438.

³ *State Bank of Omaha v. Endres*, 109 Neb. 753, 192 N.W. 322.

⁴ *Cherokee State Bank of St. Paul v. Wallace*, Minn., 279 N.W. 410.

⁵ For other cases discussing this general problem, see *In re Gross Production Tax of Wolverine Oil Co.*, 53 Okl. 24, 154 P. 362, L.R.A.1916F, 141 (uniformity clause held not to be

violated); *State ex rel. Conrad Banking Corporation of Great Falls v. Mady*, 83 Mont. 418, 272 P. 691 (uniformity clause held to be violated).

⁶ *Alward v. Johnson*, 282 U.S. 509, 51 S.Ct. 273, 75 L.Ed. 496, 75 A.L.R. 9.

⁷ *Swiss Oil Corp. v. Shanks*, 273 U.S. 407, 47 S.Ct. 393, 71 L.Ed. 709.

⁸ *Lake Superior Consol. Iron Mines v. Lord*, 271 U.S. 577, 46 S.Ct. 627, 70 L.Ed. 1093.

⁹ *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 43 S.Ct. 83, 67 L.Ed. 237.

sessed at their face value does not deny equal protection even when both are subject to the same rate of tax.¹⁰ The decisions of the Supreme Court in this field have permitted a state legislature to exercise an extremely wide discretion in classifying property for tax purposes so long as it refrained from clear and hostile discrimination against particular persons or classes. The decisions referred to above in effect sustain the validity under the equal protection clause of the principle of the classified property tax whether the difference in burden on the different classes of property is effected by variations in the rate of assessment or in the tax rates applicable to the different classes. They also sustain any reasonable application of that principle. The principle and its application in specific cases is generally held valid where the state constitution requires taxation to be uniform or uniform upon the same class of subjects,¹¹ but not where taxes are required to be equal or in proportion to the value of the property taxed.¹² The courts that sustain classified property taxes have laid down no very specific rules for determining the bases on which the classifications must be made if it is to be held reasonable, and the problem does not lend itself to such treatment. A classification based on the location of the property within the taxing district is generally held invalid,¹³ although the assessment of agricultural lands situated within a city's limits on a less onerous basis than the more urban property within those limits is at times sustained.¹⁴ The usual case in which the equal protection and uniformity clauses are invoked involves a system in which some property is expressly taxed more heavily than other property rather than one in which all property of a given class is subjected to an equal tax. A prohibited degree of inequality may, however, result from ignoring differences relevant to taxation. It has accordingly been held that taxing minerals, when owned by persons other than the owner of the surface, at a flat rate per acre violated a constitutional provision requiring taxes to be uniform upon the same class of subjects because it ignored dif-

¹⁰ *Bell's Gap R. Co. v. Pennsylvania*, 134 U.S. 232, 10 S.Ct. 533, 33 L. Ed. 892.

¹¹ *Foster v. Hart Consol. Min. Co.*, 52 Colo. 459, 122 P. 48; *Hilger v. Moore*, 56 Mont. 146, 182 P. 477; *contra*, *Chapman v. Ada County*, 48 Idaho 632, 284 P. 259.

¹² *State ex rel. Tompkins v. Shipman*, 290 Mo. 65, 234 S.W. 60.

¹³ *Anderson v. City of Asheville*, 194 N.C. 117, 138 S.E. 715.

¹⁴ *Taylor v. City of Waverly*, 94 Iowa 661, 63 N.W. 347; *Leeper v. City of South Bend*, 106 Ind. 375, 7 N.E. 1.

ferences in value between the different ore deposits.¹⁵ The similar treatment of dissimilar tax subjects may thus be as invalid as the dissimilar treatment of similar tax subjects.¹⁶

There is no tax which cannot be employed as an instrument of a state's social and economic policy, but license and excise taxes are in fact more frequently deliberately so used than is the property tax. The classifications made in imposing license and excise taxes have been a most important part of the technique for using them to affect social and economic conditions, and some of the most important cases involving the equal protection clause have concerned excise taxes in fact adopted for such purposes. This clause does not require a state to impose such taxes upon all businesses or activities if it decides to tax any of them. It does not even require that all engaged in a given business or activity shall be taxed if any so engaged are taxed. It permits a license tax to be imposed upon all laundries except steam laundries,¹⁷ and upon the sale of oleomargarine while sales of butter go untaxed.¹⁸ A state may validly except from a tax on the production and sale of electricity that produced by the use of oil or internal combustion engines or by industrial plants for their own use.¹⁹ The equal protection clause has been held to permit a state to exempt from taxes imposed for the use of the highways motor vehicles below a specified weight²⁰ and those used for carrying farm and dairy products.²¹ That clause is not violated merely because the levy of the tax subjects the taxpayer to a competitive disadvantage where his competitor is exempted from the tax. He can be made to bear this disadvantage if the competitor can be reasonably held to belong in a different class, and a municipally owned utility is for this purpose sufficiently different from its privately owned competitor to justify exempt-

¹⁵ *Northwestern Imp. Co. v. State*, 57 N.D. 1, 220 N.W. 436.

S.Ct. 599, 78 L.Ed. 1109, *Black's Cas. Constitutional Law*, 2d, 556.

¹⁶ *Cumberland Coal Co. v. Board of Revision of Tax Assessments in Greene County, Pa.*, 284 U.S. 23, 52 S.Ct. 48, 76 L.Ed. 146.

¹⁹ *Broad River Power Co. v. Query*, 288 U.S. 178, 53 S.Ct. 326, 77 L.Ed. 685.

¹⁷ *Quong Wing v. Kirkendall*, 223 U.S. 59, 32 S.Ct. 192, 56 L.Ed. 350.

²⁰ *Carley & Hamilton v. Snook*, 281 U.S. 66, 50 S.Ct. 204, 74 L.Ed. 704, 68 A.L.R. 194.

²¹ *Hammond Packing Co. v. State of Montana*, 233 U.S. 331, 34 S.Ct. 596, 58 L.Ed. 985; *A. MAGNANO CO. v. HAMILTON*, 292 U.S. 40, 54

Aero Mayflower Transit Co. v. Georgia Public Service Commission, 295 U.S. 285, 55 S.Ct. 709, 79 L.Ed. 1439.

ing the former from a tax imposed on the latter.²² The desire to equalize the competitive conditions between the individual retail store and the chain store has produced the so-called chain-store tax imposed only upon those engaged in carrying on retail business by the latter method. The differences between these two forms of doing business, and the greater advantages said to lie with the latter, have been among the reasons leading the courts to sustain the classification implicit in such taxation.²³ Nor is the equal protection clause violated by computing the tax by applying a rate structure that is progressively graduated on the basis of the number of stores operated within the state,²⁴ but it has been held a denial of equal protection to impose a higher system of graduated taxes where the chain operates in more than one county within a state than when it operates within one county.²⁵ The view that the advantages of the chain store depended upon the size of the chain has led the Supreme Court to sustain a classification in which the rate on each store operating within a state depended upon the total number of stores operated within and without the state.²⁶ It is, however, a denial of equal protection to measure the tax, or any part thereof, by applying to the gross receipts of the chain within the state a progressively graduated rate structure.²⁷ The validity of progressively graduated excise taxes apparently depends upon the particular kind of excise involved. It has been sustained in connection with a license tax on canneries,²⁸ but held to violate the equal protection clause as applied to a tax construed by the Court to be a sales tax,²⁹ and, as already stated, when applied to that part of a chain store tax measured by gross earnings. However, a license tax of fixed

²² Puget Sound Power & Light Co. v. City of Seattle, 291 U.S. 619, 54 S.Ct. 542, 78 L.Ed. 1025.

²³ State Board of Tax Com'rs of Indiana v. Jackson, 283 U.S. 527, 51 S.Ct. 540, 75 L.Ed. 1248, 73 A.L.R. 1464, 75 A.L.R. 1536.

²⁴ State Board of Tax Com'rs of Indiana v. Jackson, 283 U.S. 527, 51 S.Ct. 540, 75 L.Ed. 1248, 73 A.L.R. 1464, 75 A.L.R. 1536; Fox v. Standard Oil Co. of New Jersey, 294 U.S. 87, 55 S.Ct. 333, 79 L.Ed. 780.

²⁵ Louis K. Liggett Co. v. Lee, 288 U.S. 517, 53 S.Ct. 481, 77 L.Ed. 929, 85 A.L.R. 699.

²⁶ GREAT ATLANTIC & PACIFIC TEA CO. v. GROSJEAN, 301 U.S. 412, 57 S.Ct. 772, 81 L.Ed. 1193, 112 A.L.R. 293, Black's Cas. Constitutional Law, 2d, 584.

²⁷ Valentine v. Great Atlantic & Pacific Tea Co., 299 U.S. 32, 57 S.Ct. 56, 81 L.Ed. 22.

²⁸ Pacific American Fisheries v. Territory of Alaska, 269 U.S. 269, 46 S.Ct. 110, 70 L.Ed. 270 (case involved application of due process clause of 5th Amendment).

²⁹ Stewart Dry Goods Co. v. Lewis, 294 U.S. 550, 55 S.Ct. 525, 79 L.Ed. 1054.

amounts that varied as between classes defined in terms of the amount of business transacted has been sustained.³⁰ A tax on a given business in which both corporations and non-corporate persons are engaged may not be limited to the former,³¹ but this does not forbid the levy upon them only of taxes peculiarly applicable to corporations such as corporate franchise taxes. These must not, however, create arbitrary classifications among corporations,³² and in general foreign corporations may not be arbitrarily discriminated against once they have been admitted to do a local business within a state and while so engaged therein.³³ Nor may foreign corporations engaged in the same business within the taxing state be treated differently.³⁴ The general principles and approaches developed in applying the equal protection clause to state excise taxes have been followed in construing state constitutional provisions requiring taxes to be uniform or uniform upon the same class of subjects. The limitations resulting from other forms of such uniformity clauses depend so much upon the special language used as to make their consideration impracticable in a brief text.

It is a common feature of inheritance and estate taxes to graduate the rates progressively and to adjust the rates on the basis of the relationship of the decedent to those who succeed to his property. The classifications involved in those features have been invariably held not to violate the equal protection clause.³⁵ Nor does that clause prohibit a state from directly or indirectly imposing a proportionately larger tax on the succession to a residuum of a large estate than a smaller estate, although the residuary estate and residuary legacy be equal in each instance.³⁶ The succession to the decedent's property that has escaped taxation during his lifetime may be taxed at higher rates than those

³⁰ *Clark v. Titusville*, 184 U.S. 329, 22 S.Ct. 382, 46 L.Ed. 569.

³¹ *Quaker City Cab Co. v. Commonwealth of Pennsylvania*, 277 U.S. 389, 48 S.Ct. 553, 72 L.Ed. 927.

³² *Air-way Electric Appliance Corporation v. Day*, 266 U.S. 71, 45 S.Ct. 12, 69 L.Ed. 169; *Concordia Fire Ins. Co. v. Illinois*, 292 U.S. 535, 54 S.Ct. 830, 78 L.Ed. 1411.

³³ *Hanover Fire Ins. Co. v. Carr*, 272 U.S. 494, 47 S.Ct. 179, 71 L.Ed. 372, 49 A.L.R. 713.

³⁴ *Concordia Fire Ins. Co. v. Illinois*, 292 U.S. 535, 54 S.Ct. 830, 78 L.Ed. 1411.

³⁵ *Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283, 18 S.Ct. 594, 42 L.Ed. 1037; *Billings v. State of Illinois*, 188 U.S. 97, 23 S.Ct. 272, 47 L.Ed. 400; *Campbell v. State of California*, 200 U.S. 87, 26 S.Ct. 182, 50 L.Ed. 382.

³⁶ *Stebbins v. Riley*, 268 U.S. 137, 45 S.Ct. 424, 69 L.Ed. 884, 44 A.L.R. 1454.

imposed on the succession to his property that has paid taxes during his lifetime.³⁷ The equal protection clause permits a state to establish reasonable exemptions from these taxes.³⁸ There have been but few classifications resulting from the provisions of state inheritance and estate tax acts that have been held to violate the equal protection clause. A provision creating an irrebuttable presumption that gifts made within a specified time prior to the decedent's death were made in contemplation of death has been held invalid as creating an arbitrary classification,³⁹ as has one in which the tax on a beneficiary taking under the exercise of a power was imposed only if the power was derived under an instrument executed prior to a stated date.⁴⁰ Although there have been state decisions holding progressively graduated inheritance taxes violative of state constitutional uniformity provisions, they are generally sustained where the provision requires merely uniformity or uniformity upon the same class of subjects, and the same is true as to classifications involved in other usual features of such taxation.⁴¹ The principles employed in determining the validity of progressive rates and exemptions in connection with inheritance and estate taxes have also been applied to state income taxes. The equal protection clause has invariably been held to permit progressively graduated income taxes, the exemption of some of the income of all taxpayers, and the exemption of all of the income of those classes for whose exemption there exists a reasonable basis.⁴² The same features are almost invariably held not to violate a state constitutional requirement that taxes be uniform upon the same class of subjects,⁴³ but have been held to violate those more narrowly phras-

³⁷ *Watson v. State Comptroller of New York*, 254 U.S. 122, 41 S.Ct. 43, 65 L.Ed. 170.

³⁸ *Board of Education of Kentucky Annual Conference of Methodist Episcopal Church v. Illinois*, 203 U.S. 553, 27 S.Ct. 171, 51 L.Ed. 314, 8 Ann.Cas. 157.

³⁹ *Schlesinger v. State of Wisconsin*, 270 U.S. 230, 46 S.Ct. 260, 70 L.Ed. 557, 43 A.L.R. 1224.

⁴⁰ *Binney v. Long*, 299 U.S. 280, 57 S.Ct. 206, 81 L.Ed. 239.

⁴¹ See *In re Heck's Estate*, 120 Or. 80, 250 P. 735.

⁴² *State ex rel. Hoggart v. Nichols*, 66 N.D. 355, 265 N.W. 859; *Bacon v. Ranson*, 331 Mo. 985, 56 S.W.2d 786; *Diefendorf v. Gallet*, 51 Idaho 619, 10 P.2d 307.

⁴³ See, in addition to cases cited in footnote 42, the following: *Featherstone v. Norman*, 170 Ga. 370, 153 S.E. 58, 70 A.L.R. 449; *Reed v. Bjornson*, 191 Minn. 254, 253 N.W. 102; *Contra, Kelley v. Kalodner*, 320 Pa. 180, 181 A. 598; *Jensen v. Henneford*, 185 Wash. 209, 53 P.2d 607.

ed.⁴⁴ The conclusion has sometimes turned on whether the income tax was deemed a property or non-property tax within the meaning of the state constitution. The usual broad type of uniformity clause is also construed to permit different classes of income to be taxed at different rates.⁴⁵

The establishment of tax exemptions is an important form of classification. The classifications involved in creating tax exemptions must be reasonable to comply with the requirement not only of the equal protection clause of the Fourteenth Amendment but also with state constitutional provisions requiring uniformity of taxation.⁴⁶ The general principles defining what is reasonable are similar to those applicable in connection with other forms of classification. State constitutions, however, frequently contain express provisions dealing with this matter. These often relate to property taxes only. If a state constitution provides that certain specified classes of property shall be exempt from taxation, this is usually construed to impliedly prohibit the legislature from creating any other exemptions from property taxes, but not from other taxes.⁴⁷ Its effect has in one case been held to be merely to prevent the legislature from taxing property of the designated classes, but to leave unimpaired its power to exempt other property wherever such exemption constitutes reasonable classification.⁴⁸ The former view rests on an unreasonably broad application of the doctrine that "*expressio unius exclusio alterius est*"; the latter view is the more reasonable. If, however, the state constitution states that the legislature shall have the power to exempt certain classes of property, it is soundly held that this impliedly prevents it from exempting other property from taxation, although having no effect upon its power to create exemptions in connection with other taxes.⁴⁹ The same general

⁴⁴ *Bachrach v. Nelson*, 349 Ill. 579, 182 N.E. 909.

⁴⁵ *McPherson v. Fisher*, 143 Or. 615, 23 P.2d 913.

⁴⁶ *Williams v. Mayor, Counselor and Aldermen of Annapolis*, 289 U.S. 36, 53 S.Ct. 431, 77 L.Ed. 1015; *Citizens' Tel. Co. v. Fuller*, 229 U.S. 322, 33 S.Ct. 833, 57 L.Ed. 1215; *Lawrence University v. Outagamie County*, 150 Wis. 244, 136 N.W. 619, 2 A.L.R. 465; *Massachusetts General*

Hospital v. Inhabitants of Belmont, 233 Mass. 190, 124 N.E. 21.

⁴⁷ *State ex rel. Richards v. Armstrong*, 17 Utah 166, 53 P. 981, 41 L.R.A. 407; *City of Birmingham v. State ex rel. Carmichael*, 233 Ala. 138, 170 So. 64.

⁴⁸ *Reed v. Bjornson*, 191 Minn. 254, 253 N.W. 102.

⁴⁹ *People ex rel. v. Deutsche Evangelisch Lutherische Jehovah Gemeinde Ungeaenderter Augsburgischer Confession*, 249 Ill. 132, 94 N.E. 162.

principles would be applied in defining the effect upon the legislature's powers of constitutional provisions similar to those referred to above except with respect to the taxes to which they related. The other principal issues that have arisen under such state constitutional provisions have concerned their scope. Their consideration is beyond the purview of this discussion.

There can be no violation of either the equal protection clause or state constitutional uniformity requirements unless there exist some differences between the tax burdens imposed upon different persons or classes. The differences are generally apparent on the face of the statute imposing the tax, and in that case the sole question is whether they are reasonable. They are not thus apparent when different classes of taxpayers are subjected to different systems of taxation in connection either with a single type of tax or with different types of tax. The principles applicable to the former of these situations have been fully discussed by the federal Supreme Court. The equal protection clause permits a state to tax the same kind of property of different classes of taxpayers by different methods. The existence of a disparity in tax burden must in such case be factually established from the practical operation of the system, and the existence of a slight disparity will not suffice to render the heavier tax invalid. The only cases in which this requirement can be dispensed with is where the system shows a clear purpose to discriminate against those subjected to the heavier tax.⁵⁰ No case has been found discussing this situation when one class of taxpayers is taxed on one tax subject and another on a wholly different one. The cases applying the equal protection clause have involved classifications made in imposing one given type of tax. It is doubtful that a state would be permitted to justify unreasonable classifications in connection with one type of tax by showing that its tax system as a whole distributed the total tax burden fairly and reasonably.

Discrimination in Administration of Taxes

The equal protection clause limits a state regardless of the governmental department or agency through which it acts. It does not insure a taxpayer mathematical equality with other taxpay-

⁵⁰ General American Tank Car Corporation v. Day, 270 U.S. 367, 46 S. Ct. 234, 70 L.Ed. 635 (sustaining a system in which a state taxed the rolling stock of non-domiciled own-

ers a flat mill-rate for state purposes in lieu of all local taxes thereon while rolling stock of domiciled owners was subjected to local taxes in lieu of said state tax).

ers in the administration of a given tax. His constitutional rights are not violated if the inequality is due to the inevitable errors accompanying the determination of taxes based on factors that involve such matters of opinion as, for example, the value of the taxed property. The equal protection clause does, however, protect a taxpayer against the systematic and intentional administration of the tax laws in such manner as to discriminate against him in favor of others in the same class of taxpayers. Hence the systematic and intentional undervaluation by the taxing officials of other taxable property of the same class as that to which a taxpayer's property belongs, while his is assessed at its full value, violates his rights under the equal protection clause unless the state itself provides an adequate remedy.⁵¹ To remit him to forcing the taxing officials to raise the valuations of the under-assessed property to the statutorily required value is not an adequate remedy.⁵² A prohibited discrimination may also result from the tax officials treating all property of a given class as of the same value where that is contrary to the facts.⁵³ It is immaterial in cases of the type herein considered that the taxpayer who is being discriminated against has been taxed in accordance with the applicable statutes. The discriminatory enforcement of the statute invalidates its application to his case, and he is entitled to have his property assessed on the same basis as those in whose favor the discrimination was made. The same rules would apply in any case in which there was a systematic and intentional difference in the percentages of the true value at which property of the same class was assessed. The principle applies only where the discrimination is between different units of property, or other tax subjects, belonging to the same class.⁵⁴ Its application has thus far been principally in the field of property taxes, but it is equally applicable to all forms of taxation. State constitutional uniformity clauses have also been held to

⁵¹ *SIOUX CITY BRIDGE CO. v. DAKOTA COUNTY*, 260 U.S. 441, 43 S.Ct. 190, 67 L.Ed. 340, 28 A.L.R. 799, *Black's Cas. Constitutional Law*, 2d, 589.

⁵² *SIOUX CITY BRIDGE CO. v. DAKOTA COUNTY*, 260 U.S. 441, 43 S.Ct. 190, 67 L.Ed. 340, 28 A.L.R. 799, *Black's Cas. Constitutional Law*, 2d, 589; *Iowa-Des Moines Nat. Bank v.*

Bennett, 284 U.S. 239, 52 S.Ct. 133, 76 L.Ed. 265.

⁵³ *Cumberland Coal Co. v. Board of Revision of Tax Assessments in Greene County*, 284 U.S. 23, 52 S.Ct. 48, 76 L.Ed. 146.

⁵⁴ As to when property belongs to the same class, see, in addition to cases already cited, *Concordia Fire Ins. Co. v. Illinois*, 292 U.S. 535, 54 S.Ct. 830, 78 L.Ed. 1411.

prohibit administrative discriminations of the kind herein considered.⁵⁵

Territorial Uniformity

The states of our system exercise their functions in part through a central state government and in part through local political subdivisions. The state and the local subdivisions both exercise taxing powers. This system has given rise to several important problems in the application of the various constitutional limitations upon the taxing power. The majority of these have arisen under state constitutional provisions. It is the generally accepted principle that a local political subdivision may tax only for purposes pertaining to the district itself.⁵⁶ Its basis is not always clearly stated in the decisions applying it, but the opinions in which its basis is expressly indicated generally find that in the uniformity clause of the state's constitution.⁵⁷ It has been applied to prevent the legislature from compelling one tax district to tax for a purpose not pertaining to it,⁵⁸ but is often held not to prevent it from authorizing such district to do so.⁵⁹ The requirement of territorial uniformity is also violated when a part of a given tax district is either taxed alone to defray costs incurred for the benefit of the whole district, or is more heavily taxed therefor than are other parts of the district,⁶⁰ and when a whole district is taxed to defray the costs incurred by a part thereof in performing a function pertaining to the latter.⁶¹ These principles are intended to insure a fair distribution of the tax burden in a government embodying the theory of local self-government, and their application implies a more or less definite theory as to the functions pertaining to both the central state government and the several local subdivisions. Each state may de-

⁵⁵ *Cummings v. Merchant's Nat. Bank*, 101 U.S. 153, 25 L.Ed. 903; *White River Lumber Co. v. State*, 175 Ark. 956, 2 S.W.2d 25.

⁵⁶ *Steiner v. Sullivan*, 74 Minn. 498, 77 N.W. 286; *Cotham v. Coffman*, 111 Ark. 108, 163 S.W. 1183.

⁵⁷ *Campbell County v. City of Newport*, 174 Ky. 712, 193 S.W. 1, L.R.A. 1917D, 791.

⁵⁸ *Board of Com'rs of Jackson County v. State ex rel. Shields*, 155 Ind. 604, 58 N.E. 1037.

⁵⁹ *Lund v. Chippewa County*, 98 Wis. 640, 67 N.W. 920, 34 L.R.A. 131; *Callam v. Saginaw*, 50 Mich. 7, 14 N.W. 677.

⁶⁰ *Cotham v. Coffman*, 111 Ark. 108, 163 S.W. 1183; *Campbell County v. County of Newport*, 174 Ky. 712, 193 S.W. 1, L.R.A.1917D, 791; *Simmons v. Ericson*, 54 S.D. 429, 223 N.W. 342.

⁶¹ *Simon v. Northrup*, 27 Or. 487, 40 P. 560, 30 L.R.A. 171.

termine for itself what functions it wishes to retain for its central government, which of them it wishes to impose upon its local political or governmental subdivisions, and upon the character of the subdivisions upon which it wishes to impose the latter functions. The principles of territorial uniformity must be applied in the light of each state's action in these matters. There are several important tests invoked in determining whether they have been violated. A district is not being made to bear a tax burden in violation of the requirements of territorial uniformity if it receives the benefits of the expenditure of the proceeds of the tax,⁶² or if it is reasonably chargeable with responsibility for the situation that created the need for the expenditure for which the proceeds of the tax are used.⁶³ These tests are used not only to determine whether a district is being taxed for a purpose not pertaining to it at all, but also for determining whether it is being made to bear an unjustified part of the cost of performing a function belonging to a larger district of which it is a part.⁶⁴ Problems of the latter type arise principally because there are certain functions the performance of which may validly be shared by several governmental units. It has, for example, been held that a state may divide the costs of providing a highway system for the state between it and the governmental units through which particular parts of the highway run.⁶⁵

The problem of territorial uniformity has sometimes arisen in connection with laws providing for the distribution to local political or governmental subdivisions of the proceeds of taxes levied throughout the whole state. No question would arise if the local units were required to expend the amounts received for the local execution of a function pertaining to the state itself. The problem arises so far as the local unit is required or permitted to use the amounts received for purely local purposes. The Supreme Court of the United States has recognized that such a system might produce such an extreme inequality in the distri-

⁶² *Steiner v. Sullivan*, 74 Minn. 498, 77 N.W. 286; *Milwaukee County v. Halsey*, 149 Wis. 82, 136 N.W. 139; *Kinney v. City of Astoria*, 108 Or. 514, 217 P. 840; *Commonwealth ex rel. v. Sparks*, 201 Ky. 5, 255 S.W. 859; *Wilson v. Lambert*, 168 U.S. 611, 18 S.Ct. 217, 42 L.Ed. 599; *Mobile County v. Kimball*, 102 U.S. 691, 26 L.Ed. 238.

⁶³ *Thielen v. Metropolitan Sewer-*

age Commission, 178 Wis. 34, 189 N.W. 484.

⁶⁴ See *Campbell County v. County of Newport*, 174 Ky. 712, 193 S.W. 1, L.R.A.1917D, 791; *Steiner v. Sullivan*, 74 Minn. 498, 77 N.W. 286.

⁶⁵ *Murray v. Smith*, 117 Minn. 490, 136 N.W. 5, 40 L.R.A., N.S., 173, Ann. Cas.1913D, 548; *Alexander v. McInnis*, 129 Minn. 165, 151 N.W. 899.

bution of the tax burden as to violate the due process and equal protection clauses of the Fourteenth Amendment, but it has never yet held that any actual system of that character did so violate either or both of said clauses.⁶⁶ It is quite probable that the use of the proceeds received by a local unit for purely local purposes will be held not to violate said constitutional provisions, and it is certain that the Supreme Court will give a state a wide discretion in determining what functions are of sufficient state-wide importance to permit their execution even through local units subsidized from tax revenues collected by a state-wide tax. The courts of many states have construed the uniformity clauses of their respective state constitutions to limit the distribution of state tax revenues to local units for use by them. They have permitted their use for local activities having a state-wide significance, but have held the principles of territorial uniformity violated if the local units are permitted or required to use the amounts received by them for purely local purposes.⁶⁷ States belonging in this group apply the same principles where tax revenues raised within a given district are distributed to its subdivisions.⁶⁸ The courts of some states have held that the uniformity clauses of their respective constitutions applied only to the levy of taxes, and not to the distribution of their proceeds.⁶⁹ A state that resorts to the system herein considered does not violate the equal protection clause merely because a given locality or district contributes more than it receives back in the distribution of the proceeds of the tax.⁷⁰ It is clear, however, that, whatever be the limits imposed on this system by the constitutional provisions herein considered, they do not prevent a wide use of grants in aid from the state treasury to the state's local subdivisions.

⁶⁶ *Dane v. Jackson*, 256 U.S. 589, 41 S.Ct. 566, 65 L.Ed. 1107. See also *Knights v. Jackson*, 260 U.S. 12, 43 S.Ct. 1, 67 L.Ed. 102; *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 43 S.Ct. 684, 67 L.Ed. 1167.

⁶⁷ *State ex rel. Van Dyke v. Cary*, 181 Wis. 564, 191 N.W. 546 (distribution of proceeds of state income tax to local units for paying teachers' pensions held valid); *Friedlander v. Gorman*, 126 Ohio St. 163, 184 N.E. 530 (distribution of state tax revenues to local units for use for local purposes held invalid); *Berry v. Fox*,

114 W.Va. 513, 172 S.E. 896 (distribution of state funds to local units for use to pay off school bonds and road bonds held invalid).

⁶⁸ *State ex rel. City of New Prague v. Scott County*, 195 Minn. 111, 261 N.W. 863; *Robbinsdale, Village of v. Hennepin County*, 199 Minn. 203, 271 N.W. 491.

⁶⁹ *Greene County v. Snow Hill R. Co.*, 197 N.C. 419, 149 S.E. 397.

⁷⁰ *Dane v. Jackson*, 256 U.S. 589, 41 S.Ct. 566, 65 L.Ed. 1107.

Special Assessments

A state may create local subdivisions endowed with a power of local taxation either for general governmental purposes or for specific and limited purposes. The due process and equal protection clauses of the Fourteenth Amendment have never been held to have been violated by the creation of a political subdivision with general powers of local government, or by the determination of its geographical boundaries by the legislature or under its authority.⁷¹ This statement does not hold for districts created for a special or limited purpose. The due process clause prohibits even the legislature from including within a district created for a definite purpose those lands which can receive neither a direct nor indirect benefit from the execution of that purpose. It has, accordingly, been held that lands that could by no possibility benefit directly or indirectly from the construction and maintenance of a levee could not validly be included within the levee district,⁷² and that the inclusion of submerged lands within a school district merely in order to tax it and thus relieve the burden on other lands within the district was so arbitrary as to violate the due process clause.⁷³ That clause is not, however, violated by the inclusion within a district of lands that will receive a direct or indirect benefit from the improvement for whose construction the district was organized.⁷⁴ Neither does it require that all the lands that can receive a direct or indirect benefit from the improvement shall be included.⁷⁵ These principles apply not only when the district is created by the state legislature but also when created by any body exercising legislative powers such as a city council.⁷⁶ They apply also where the district is created by administrative action under legislative authority. The taxpayer is, however, entitled to notice and an opportunity to be heard on

⁷¹ See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151 (holding that citizens and taxpayers of one municipality annexed to another are not deprived of property without due process of law by reason of the additional tax burden resulting from the annexation).

⁷² *Myles Salt Co. v. Board of Com'rs of Iberia & St. Mary Drainage Dist.*, 239 U.S. 478, 36 S.Ct. 204, 60 L.Ed. 392.

⁷³ *Paducah-Illinois R. Co. v. Graham, D.C.*, 46 F.2d 806.

⁷⁴ *Milheim v. Moffat Tunnel Improvement Dist.*, 262 U.S. 710, 43 S.Ct. 694, 67 L.Ed. 1194; *Valley Farms Co. of Yonkers v. Westchester County*, 261 U.S. 155, 43 S.Ct. 261, 67 L.Ed. 585.

⁷⁵ *Butters v. City of Oakland*, 263 U.S. 162, 44 S.Ct. 62, 68 L.Ed. 228; *Goldsmith v. George G. Prendergast Const. Co.*, 252 U.S. 12, 40 S.Ct. 273, 64 L.Ed. 427.

⁷⁶ *Gast Realty & Investment Co. v. Schneider Granite Co.*, 240 U.S. 55, 36 S.Ct. 400, 60 L.Ed. 526.

the inclusion of his land within a special improvement district established by administrative action to which he is not entitled where the district is directly established by legislative action.⁷⁷ The theory on which special improvement districts are created is that the lands within the district will derive a special direct or indirect benefit therefrom. The fact, however, that the total costs of the improvement will exceed the total benefits therefrom does not itself show a violation of the due process clause, but is a factor in determining whether the system and the levies thereunder are wholly arbitrary and thus invalid.⁷⁸

The costs incurred by a special improvement district may be distributed over the lands within it in many ways. It does not violate due process to spread them on the basis of the value of the property in the same manner as general taxes are distributed.⁷⁹ The usual practice is to distribute them on the basis of the benefits received from the improvement. The particular factor used to measure the relative benefits of the different parcels varies with the type of improvement. It is, however, essential that, if the amount assessed against a part of the benefitted property is determined by and limited to the benefits it receives, that assessed against other benefitted property shall be similarly determined and limited. The use of methods for distributing the costs on the basis of benefits violates the due process and equal protection clauses if they produce an undue inequality.⁸⁰ An assessment grossly in excess of the benefits received violates the

⁷⁷ *Browning v. Hooper*, 269 U.S. 396, 46 S.Ct. 141, 70 L.Ed. 330.

⁷⁸ *Butters v. City of Oakland*, 263 U.S. 162, 44 S.Ct. 62, 68 L.Ed. 228; *Roberts v. Richland Irr. Dist.*, 289 U.S. 71, 53 S.Ct. 519, 77 L.Ed. 1038; *Road Imp. Dist. No. 1 of Franklin County, Ark., v. Missouri Pac. R. Co.*, 274 U.S. 188, 47 S.Ct. 563, 71 L.Ed. 992; *Village of Norwood v. Baker*, 172 U.S. 269, 19 S.Ct. 187, 43 L.Ed. 443.

⁷⁹ *Memphis & C. R. Co. v. Pace*, 282 U.S. 241, 51 S.Ct. 108, 75 L.Ed. 315, 72 A.L.R. 1096.

⁸⁰ *Withnell v. Ruecking Const. Co.*, 249 U.S. 63, 39 S.Ct. 200, 63 L.Ed. 479 (sustains distribution of paving costs on area basis); *French v. Bar-*

ber Asphalt Paving Co., 181 U.S. 324, 21 S.Ct. 625, 45 L.Ed. 879 (sustains distribution of paving costs on front footage basis); *Kansas City Southern R. Co. v. Road Imp. Dist. No. 6 of Little River County, Ark.*, 256 U.S. 658, 41 S.Ct. 604, 65 L.Ed. 1151 (holds invalid distribution of road construction costs by one rule in the case of farm and city lands and by another rule in the case of railroad right of way); *Road Imp. Dist. No. 1 of Franklin County, Ark., v. Missouri Pac. R. Co.*, 274 U.S. 188, 47 S.Ct. 563, 71 L.Ed. 992 (holds invalid a distribution of road construction costs on basis of value of realty in case of taxpayers other than railroads whose shares were based on value of realty and personalty).

due process clause if the costs are being distributed on that basis,⁸¹ but, if the whole or part of the costs are defrayed by resort to the general power to tax, then the tax is not invalid merely because the total paid with respect to any given parcel of land exceeds the benefits received by it even where the relative contributions of the different parcels to this general tax are based on the benefits received by them from the improvement.⁸² The method of special assessments may be resorted to with respect to past improvements, at least as long as these still exist.⁸³ There is nothing in the federal Constitution that requires a state to defray the cost of special improvements benefitting particular lands by the system of special assessments based on benefits. It may, if it wishes, rely wholly upon its power to levy general taxes.⁸⁴

Classification and Federal Privileges Clause

Section 1 of the Fourteenth Amendment provides that no state shall make or enforce any law abridging the privileges or immunities of citizens of the United States. It was only recently that this was interpreted to limit a state in classifying for tax purposes. A state income tax law exempted interest on loans made at less than a specified rate of interest if the loan was made within it but not if the loan was made outside the state. It was held that the right of a citizen of the United States residing within the state to make loans outside that state was a privilege of federal citizenship, that the provision of the tax statute limiting the exemption of interest to that derived from loans made within the state discriminated unreasonably against the exercise of that privilege, and that such discrimination abridged it in violation of the constitutional provision. The prevailing opinion found the discrimination unreasonable in part because it subverted no legitimate state policy.⁸⁵

⁸¹ *Road Imp. Dist. No. 1 of Franklin County, Ark., v. Missouri Pac. R. Co.*, 274 U.S. 188, 47 S.Ct. 563, 71 L.Ed. 992; *Village of Norwood v. Baker*, 172 U.S. 269, 19 S.Ct. 187, 43 L.Ed. 443.

⁸² *Roberts v. Richland Irr. Dist.*, 289 U.S. 71, 53 S.Ct. 519, 77 L.Ed. 1038.

⁸³ *Phillip Wagner, Inc., v. Leser*, 239 U.S. 307, 36 S.Ct. 66, 60 L.Ed. 230.

⁸⁴ *Memphis & C. R. Co. v. Pace*, 282 U.S. 241, 51 S.Ct. 108, 75 L.Ed. 315, 72 A.L.R. 1096.

⁸⁵ *Colgate v. Harvey*, 296 U.S. 404, 56 S.Ct. 252, 80 L.Ed. 299, 102 A.L.R. 54. The Court also held the discrimination violative of the equal protection clause.

RETROACTIVE TAXATION ⁸⁶

287. The due process clause of the Fourteenth Amendment prohibits a state from giving arbitrary retroactivity to its tax laws. The constitutions of some of the states contain specific provisions against retroactive taxation.

The term "retroactive taxation" is applied to several quite dissimilar situations. It may mean the present creation of a tax liability imposed with respect to transactions already past, or the present creation of a tax liability whose amount is measured by factors already past. A state is limited by the due process clause of the Fourteenth Amendment in presently imposing a liability based on, or measured by, past factors. It is seldom, if ever, that property taxes are imposed for years prior to that when the law imposing them is enacted. It has been intimated that such a procedure would amount to confiscation,⁸⁷ and it is invalid where the state constitution prohibits all retroactive laws.⁸⁸ A legislature does not, however, invalidly impair vested rights or violate due process by curative laws validating taxes theretofore illegally levied if the defect was one that did not go to the jurisdiction to levy the original tax,⁸⁹ and a curative law validating a tax, theretofore levied under a statute that was invalid because of a formal defect, has been held not invalidly to impair vested rights.⁹⁰ The due process clause of the Fourteenth Amendment is not violated by retrospective legislation validating an illegally organized special assessment district,⁹¹ or authorizing the levy of special assessments for past improvements still in existence.⁹² Such legislation has, however, been held to violate a state con-

⁸⁶ For discussion of retroactive federal taxation, see Chapter 7, Sections 128-130.

⁸⁷ See *First Nat. Bk. v. Covington*, 6 Cir., 103 F. 523; but see *Welch v. Henry*, 305 U.S. —, 59 S.Ct. 121, 83 L.Ed. —.

⁸⁸ *Castleberry v. Coffee*, Tex.Com. App., 272 S.W. 767.

⁸⁹ Held valid: *Marion County v. Louisville & N. R. Co.*, 91 Ky. 388, 15 S.W. 1061; *Richman v. Supervisors of Muscatine County*, 77 Iowa 513, 42 N.W. 422, 4 L.R.A. 445, 14

Am.St.Rep. 308. Held invalid, *People ex rel. v. Chicago, M. & St. P. R. Co.*, 321 Ill. 499, 152 N.E. 560; *Inhabitants of Otisfield v. Scribner*, 129 Me. 311, 151 A. 670.

⁹⁰ *Chicago R. I. & P. R. Co. v. Rosendaum*, 212 Iowa 227, 231 N.W. 646.

⁹¹ *Charlotte Harbor & N. R. Co. v. Welles*, 260 U.S. 8, 43 S.Ct. 3, 67 L.Ed. 100.

⁹² *Phillip Wagner, Inc. v. Leser*, 239 U.S. 207, 36 S.Ct. 66, 60 L.Ed. 230.

stitutional provision prohibiting retrospective legislation.⁹³ These principles would apply as well to other than property taxes and special assessments. The rule, as generally formulated with respect to privilege taxes, is that due process prohibits the levy of a tax on a privilege that has been completely exercised prior to the enactment of the law imposing the tax. This principle has been frequently applied to inheritance taxes on inter vivos transfers includible among those subject to tax. If the transferor has completely divested himself of his interest prior to the enactment of the law, the transfer cannot be constitutionally taxed.⁹⁴ If he retained any interest at that time which persisted until his death, due process permits the tax to be imposed.⁹⁵ The same principles have been applied to prevent the taxation of the mere going into possession of an estate vested in interest prior to the date of the taxing statute's enactment.⁹⁶ A statute enacted after a decedent's death may validly tax the transfer of any part of the estate's property remaining undistributed when the statute was passed.⁹⁷ The same principles govern changes in inheritance tax statutes affecting such matters as exemptions and rates.⁹⁸ The general rule is that a vested interest is protected against impairment or diminution through a subsequent change in the tax law.⁹⁹ Income taxes are usually imposed on the income received during the whole of the calendar year during which the tax law is enacted even when enacted subsequent to its commencement, but are at times imposed with respect to income received prior to the year of the law's enactment. This is generally held to involve no unconstitutional retroactivity,¹ ex-

⁹³ *Gast Realty & Investment Co. v. Schneider*, 296 Mo. 687, 246 S.W. 177.

⁹⁴ *Coolidge v. Long*, 282 U.S. 582, 51 S.Ct. 306, 75 L.Ed. 562.

⁹⁵ *Binney v. Long*, 299 U.S. 280, 57 S.Ct. 206, 81 L.Ed. 239; *Saltonstall v. Saltonstall*, 276 U.S. 260, 48 S.Ct. 225, 72 L.Ed. 565; *In re Schmidlapp's Estate*, 236 N.Y. 278, 140 N.E. 697.

⁹⁶ *In re Pell's Estate*, 171 N.Y. 48, 63 N.E. 789, 57 L.R.A. 540, 89 Am. St.Rep. 791.

⁹⁷ *Cahen v. Brewster*, 203 U.S. 543, 27 S.Ct. 174, 51 L.Ed. 310, 8 Ann.Cas. 215.

⁹⁸ *Magee v. Commissioner of Corporations and Taxation*, 256 Mass. 512, 153 N.E. 1.

⁹⁹ *Hunt v. Wicht*, 174 Cal. 205, 162 P. 639, L.R.A.1917C, 961; *Coolidge v. Long*, 282 U.S. 582, 51 S.Ct. 306, 75 L.Ed. 562.

¹ *Welch v. Henry*, 223 Wis. 319, 271 N.W. 68; *aff'd*, 305 U.S. —, 59 S.Ct. 121, 83 L.Ed. —; *Stanley v. Gates*, 179 Ark. 886, 19 S.W.2d 1000; *People ex rel. Stafford v. Travis*, 231 N.Y. 339, 132 N.E. 109, 15 A.L.R. 1319; *contra*, *Norman v. Bradley*, 173 Ga. 482, 160 S.E. 413.

cept where the constitution expressly prohibits all retrospective legislation or all retroactive taxation.² The same rule prevails with respect to other changes involving increases in tax liability, such as those that redefine income.³ It appears that state courts have in the past been more inclined to find a prohibited degree of retroactivity present in tax laws than has the federal Supreme Court.

TAX PROCEDURE

288. The due process clause of the Fourteenth Amendment requires that a taxpayer shall be given notice of, and an opportunity to be heard on, any matters on which depend the validity, existence, and amount of any tax liability imposed upon him, except where the matter is one such that a hearing thereon can have no effect upon a decision on any of these factors.
289. Said clause is not violated by the adoption by a state of any fair and reasonable method for enforcing the taxes imposed by it.

A tax constitutes a liability which must ultimately be discharged by payment unless remitted or forgiven. A state's tax laws define both the conditions on which the liability for the tax arises, the principles by which its amount is to be determined, and the time and manner of its payment or satisfaction. It is essential to the existence of a tax liability that the statute imposing it be constitutional, and that in a given case the facts exist on the existence of which the statute conditions the accrual of the liability. The validity of the statute, and the ascertainment of the conditions on which its terms make the accrual of the tax depend, are questions of law. The right of a taxpayer to be heard on those matters, and to an opportunity to have an ultimate judicial determination thereon, is so clear that the issue practically never comes before the courts except to have it determined whether the procedure sufficiently accords it.⁴ The existence of the requisite facts and conditions in any given case, however, is a question of fact the decision of which involves the exercise of administrative or quasi-judicial functions. The same analysis as that given

² *Smith v. Dirckx*, 283 Mo. 188, 223 S.W. 104, 11 A.L.R. 510.

³ *Filioli, Inc., v. Johnson*, 4 Cal.2d 662, 51 P.2d 1093; *West v. Tax Commission*, 207 Wis. 557, 242 N.W. 165.

⁴ See discussion in *Anniston Mfg. Co. v. Davis*, 301 U.S. 337, 57 S.Ct. 816, 81 L.Ed. 1143.

with respect to the existence of a tax liability applies to the problem of its measurement. The general rule is that due process requires that the taxpayer be accorded an opportunity to be heard at some stage in the proceedings before his liability is irrevocably fixed with respect to all matters the ascertainment of which involves the exercise of such administrative or quasi-judicial functions so far as those matters affect the existence or extent of his liability.⁵ It is not essential that this opportunity be accorded him at one particular stage rather than another, and it is immaterial whether it be accorded before the amount of the tax is determined or in subsequent proceedings for its collection.⁶ The requirements of due process as to an opportunity to be heard are invariably held to be satisfied if the tax is collectible only by a judicial proceeding in which the taxpayer is permitted to interpose every defense affecting the validity or amount of the tax, or if he is permitted to do so in a judicial proceeding to enjoin the collection of the tax.⁷ No prior opportunity to be heard need be accorded where the law provides for the procedures last referred to.⁸ Due process does not require that the taxpayer be accorded a judicial hearing on issues of fact, but is satisfied if he is allowed a full and fair hearing before an administrative officer or board.⁹ The opportunity to be heard with respect to any such matter must be that of being heard before those whose decision thereon is final.¹⁰ The right to a hearing includes that of presenting facts and arguments in support of the taxpayer's position.¹¹ A taxpayer who fails to take advantage of the opportunity to be heard accorded him loses his right to object to an assessment made against

⁵ *Turner v. Wade*, 254 U.S. 64, 41 S.Ct. 27, 65 L.Ed. 134.

⁶ *Winona & St. Paul Land Co. v. State of Minnesota*, 159 U.S. 526, 16 S.Ct. 83, 40 L.Ed. 247; *Pittsburgh, C., C. & St. L. R. Co. v. Board of Public Works of West Virginia*, 172 U.S. 32, 19 S.Ct. 90, 43 L.Ed. 354.

⁷ *Winona & St. Paul Land Co. v. State of Minnesota*, 159 U.S. 526, 16 S.Ct. 83, 40 L.Ed. 247; *Clement Nat. Bank v. Vermont*, 231 U.S. 120, 34 S.Ct. 31, 58 L.Ed. 147; *McMillen v. Anderson*, 95 U.S. 37, 24 L.Ed. 335.

⁸ *Pittsburgh, C., C. & St. L. R. Co. v. Board of Public Works of West Virginia*, 172 U.S. 32, 19 S.Ct. 90, 43 L.Ed. 354; *Wells Fargo & Co. v. State of Nevada*, 248 U.S. 165, 39 S.Ct. 62, 63 L.Ed. 190.

⁹ *Palmer v. McMahon*, 133 U.S. 660, 10 S.Ct. 324, 33 L.Ed. 772.

¹⁰ *Turner v. Wade*, 254 U.S. 64, 41 S.Ct. 27, 65 L.Ed. 134; cf. *Farncomb v. City and County of Denver*, 252 U.S. 7, 40 S.Ct. 271, 64 L.Ed. 424.

¹¹ *Londoner v. City and County of Denver*, 210 U.S. 373, 28 S.Ct. 708, 52 L.Ed. 1103.

him.¹² If, however, his failure was due to reliance upon a decision of a state's highest court under which he had no right to be heard on a given matter, the subsequent reversal of that decision at a time when his right to be heard had lapsed cannot validly deprive him thereof.¹³ The right to a hearing may not be denied for failure of a taxpayer to file a return required by law where such denial would be arbitrary,¹⁴ but may be denied for such failure if it does not produce arbitrary results.¹⁵ The right to a hearing has in fact been most frequently protected with respect to valuations of property for tax purposes. It is, however, not required even with respect thereto if the taxpayer's liability will not be affected by a decision thereon, as is the case where a reviewing board increases the valuation of all property within its district by a uniform percentage.¹⁶ This rule is merely an application of a broader principle that the right to be heard does not include matters the decision on which can have no effect upon either the existence or amount of a tax. This is true with respect to the amount of every tax the amount of which has been fixed by the legislature at a specific amount.¹⁷ The same principle applies to every matter on which the legislative judgment is final even though the existence or amount of a tax are dependent thereon, such as the necessity for a given improvement the cost of which is to be defrayed by an assessment of benefitted property.¹⁸

¹² *Chicago, M., St. P. & P. R. Co. v. Risty*, 276 U.S. 567, 48 S.Ct. 396, 72 L.Ed. 703; *McGregor v. Hogan*, 263 U.S. 234, 44 S.Ct. 50, 68 L.Ed. 282.

¹³ *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107. See also *Orcutt v. Crawford*, 10 Cir., 85 F.2d 146.

¹⁴ *Central of Georgia R. Co. v. Wright*, 207 U.S. 127, 28 S.Ct. 47, 52 L.Ed. 134, 12 Ann.Cas. 463.

¹⁵ *Pullman Co. v. Knott*, 235 U.S. 23, 35 S.Ct. 2, 59 L.Ed. 105.

¹⁶ *Bi-Metallic Inv. Co. v. State Board of Equalization*, 239 U.S. 441, 36 S.Ct. 141, 60 L.Ed. 372. As to whether a reviewing board violates

due process where it increases the value of particular property without specific notice to its owner, see *Beveridge v. Baer*, 59 S.D. 563, 241 N.W. 727, 84 A.L.R. 189 (that it does); *Shell Petroleum Corporation v. State Board of Equalization*, 170 Okl. 581, 41 P.2d 106 (that it does not where statute fixes date and place of board's meeting).

¹⁷ *Hodge v. Muscatine County*, 196 U.S. 276, 25 S.Ct. 237, 49 L.Ed. 477.

¹⁸ *Parsons v. District of Columbia*, 170 U.S. 45, 18 S.Ct. 521, 42 L.Ed. 943. For other applications of the principle, see *Williams v. Eggleston*, 170 U.S. 304, 18 S.Ct. 617, 42 L.Ed. 1047 (legislative creation of a taxing district); *Hancock v. City of Muskogee*, 250 U.S. 454, 39 S.Ct. 528, 63 L.Ed. 1081 (apportionment of assess-

Notice to the taxpayer is an essential element in his right to have an opportunity to be heard. Due process does not require any particular form of notice but is satisfied by any form that may reasonably be expected to inform a taxpayer that a matter affecting his interests is to be determined and an opportunity afforded him to be heard with respect thereto. It is sufficient in assessing taxes that the statute names the time and place for the meeting of the assessing board,¹⁹ and notice by publication is adequate for instituting proceedings for the collection of taxes.²⁰ Due process requires that the law itself provide for giving some adequate form of notice, and it is not sufficient if notice has in fact been given as a matter of grace.²¹ The right to notice exists only with respect to matters as to which the taxpayer is entitled to an opportunity to be heard.²²

Collection of Taxes

A state is subject to very few constitutional limitations in the collection of taxes imposed by it. It does not deprive a person of his property without due process of law to compel him to collect and pay over a tax due from another with respect to a transaction to which both are parties. A merchant may, accordingly, be forced to collect a sales tax imposed upon purchasers and due with respect to sales made by him.²³ The fact that he is put to expense in collecting the tax does not deprive him of property without due process of law. A person may also be made to pay a tax due from another if proper provision is made to protect him against loss. Thus the owners of bonded warehouses can be made to pay a tax due from the owners of the goods therein where the former are given a lien for the amounts paid upon such goods.²⁴ In all the cases in which methods of this character have been sustained, there existed a relationship between the person made to collect or pay the tax and

ment on a basis involving merely a mathematical computation).

¹⁹ Pittsburgh, C., C. & St. L. R. Co. v. Backus, 154 U.S. 421, 14 S.Ct. 1114, 38 L.Ed. 1031.

²⁰ Winona & St. Paul Land Co. v. State of Minnesota, 159 U.S. 526, 16 S.Ct. 83, 40 L.Ed. 247.

²¹ Security Trust & Safety Vault Co. v. City of Lexington, 203 U.S. 323, 27 S.Ct. 87, 51 L.Ed. 204.

²² Parsons v. District of Columbia, 170 U.S. 45, 18 S.Ct. 521, 42 L.Ed. 943.

²³ Johnson v. Diefendorf, 56 Idaho 620, 57 P.2d 1068.

²⁴ Carstairs v. Cochran, 193 U.S. 10, 24 S.Ct. 318, 48 L.Ed. 596. See also Illinois Cent. R. Co. v. Commonwealth of Kentucky, 218 U.S. 551, 31 S.Ct. 95, 54 L.Ed. 1147.

the person from whom it was due with respect to the transaction or property on which the tax was levied. They would not justify a law imposing upon a person a general duty to collect or pay taxes due from another at his own expense or risk.

A state is not prevented by the due process clause of the Fourteenth Amendment from enforcing the collection of property taxes by an administrative or judicial sale of the property, at least not where the procedure affords the owner thereof adequate opportunity to protect his interest therein.²⁵ Neither is that provision violated by imposing upon residents a personal liability for taxes upon their property within the state.²⁶ It is not wholly clear how far a state is permitted to impose a personal liability upon non-residents for taxes that it may validly impose upon them or their property. It has been held that the state of corporate domicile might impose a personal liability upon non-resident shareholders for a tax upon their shares as a condition on their right to acquire and own them.²⁷ It has also been held that a state does not violate due process by collecting from the owner's local administrator taxes due it on property for the period when it was owned within it by a non-resident.²⁸ It has, however, been held that an assessment of a property tax is in the nature of a judgment, and that to impose a personal liability therefor upon a non-resident owner takes his property without due process of law, at least where he has not appeared in any of the proceedings leading up to the levying of the assessment.²⁹ It is difficult to state, in the light of these several decisions, just under what circumstances a state may, consistently with due process, impose a personal liability upon non-residents for taxes on property owned by them within it.³⁰ There can be no doubt that it could impose a personal liability upon non-residents for taxes on transactions or business conducted within it by the non-residents or their agents.³¹

²⁵ *King v. Mullins*, 171 U.S. 404, 18 S.Ct. 925, 43 L.Ed. 214; *Kentucky Union Co. v. Commonwealth of Kentucky*, 219 U.S. 140, 31 S.Ct. 171, 55 L.Ed. 137.

²⁶ *Palmer v. McMahon*, 133 U.S. 660, 10 S.Ct. 324, 33 L.Ed. 772.

²⁷ *Corry v. City of Baltimore*, 196 U.S. 466, 25 S.Ct. 297, 49 L.Ed. 556.

²⁸ *Bristol v. Washington County*,
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177 U.S. 133, 20 S.Ct. 585, 44 L.Ed. 701.

²⁹ *Dewey v. City of Des Moines*, 173 U.S. 193, 19 S.Ct. 379, 43 L.Ed. 665.

³⁰ See *Nickey v. State of Mississippi*, 292 U.S. 393, 54 S.Ct. 743, 78 L. Ed. 1323.

³¹ See *Collector of Taxes of Boston v. Rising Sun Street Lighting Co.*,

No taxpayer has a vested right in the procedure for the collection of a tax which was in force when the tax accrued. A statute enacted thereafter does not violate due process if applied to prior taxes, and interest may be imposed upon delinquent taxes by a law enacted subsequent to the time of their accrual.³²

229 Mass. 494, 118 N.E. 871, and
Greenbaum v. Commonwealth, 147
Ky. 450, 144 S.W. 45, Ann.Cas.1913D,
338.

³² League v. State of Texas, 184 U.
S. 156, 22 S.Ct. 475, 46 L.Ed. 478.

CHAPTER 18

THE POWER OF EMINENT DOMAIN

- 290-293. Nature of the Power.
- 294-295. The Doctrine of Public Use.
- 296-298. What Property May Be Taken.
- 299-300. When Property is Deemed to Have Been Taken.
- 301-303. Compensation.
- 304. Procedure.

NATURE OF THE POWER

- 290. The power of eminent domain is the power of a politically organized society to condemn private property for a public use. The United States and each of the several states possesses it. It may be delegated to private persons subject to the same limitations that apply when exercised by the public itself.
- 291. The Fifth Amendment to the Constitution of the United States limits the federal government, and those to whom it may have delegated the power, in their exercise thereof by the requirement that private property shall not be taken for public use without just compensation.
- 292. The constitutions of most of the states, and the due process clause of the Fourteenth Amendment to the federal Constitution, impose similar limitations upon the exercise of this power by a state or under its authority.
- 293. The power of eminent domain can be exercised only in pursuance of legislative authority, and to the extent and in the manner designated by the legislature.

The federal Constitution does not expressly include the power of eminent domain among those conferred upon the United States or any of the departments of its government established thereby. The Fifth Amendment to it impliedly recognizes that the United States possesses the power by providing that private property shall not be taken for public use without just compensation, but this can scarcely be construed as a grant to it thereof. It has, however, been held to possess it so far as necessary and proper for carrying into execution the powers delegated to the federal government, and to be entitled to exercise it within the territorial limits of a state without the latter's consent in

the same manner as its other powers are exercisable therein.¹ It is not customary for a state's constitution to either reserve that power to the state or to expressly grant it to any of the governmental departments established by that constitution. Each of the several states, however, possesses it. It is these facts that are denoted by the legal view that the power of eminent domain is an inherent and essential power of sovereignty. It is furthermore a part of our constitutional theory that the power is legislative in character. This does not mean that every step in the process by which a person's private property is taken for a public use is legislative. It means only that such property may be so taken only under legislative authority, and only to the extent and in the manner determined by the legislature.² Its decisions on the necessity for the taking of private property, and on the amount thereof and the estate therein that the public interest requires to be taken, are final and not subject to judicial review if the taking is for a public use.³ Nor are those whose property is to be taken for such use entitled to a hearing on those matters.⁴ The legislature may confer the power of eminent domain upon the state's political subdivisions,⁵ upon any public agency or corporation created by it for governmental purposes,⁶ and even upon private persons or corporations for exercise by them in furnishing the public with what are generally called public utility services.⁷ There is no reason why one state should not confer upon a political subdivision or agency of another state the power to condemn property within the former, although there is no constitutional principle requiring it to do so. The general test of the validity of a legislative grant of the power of eminent domain to any public or private agency is not whether the agency is public or private but whether the power is to be exercised by that agency for a public use. The legis-

¹ *Kohl v. United States*, 91 U.S. 367, 23 L.Ed. 449.

² *FAIRCHILD v. CITY OF ST. PAUL*, 46 Minn. 540, 49 N.W. 325, *Black's Cas. Constitutional Law*, 2d, 594.

³ *People v. Smith*, 21 N.Y. 595; *Boston v. Talbot*, 206 Mass. 82, 91 N.E. 1014; *Rindge Co. v. Los Angeles County*, 262 U.S. 700, 43 S.Ct. 689, 67 L.Ed. 1186.

⁴ *Rindge Co. v. Los Angeles Coun-*

ty, 262 U.S. 700, 43 S.Ct. 689, 67 L. Ed. 1186; *Bragg v. Weaver*, 251 U.S. 57, 40 S.Ct. 62, 64 L.Ed. 135.

⁵ *Boston v. Talbot*, 206 Mass. 82, 91 N.E. 1014.

⁶ *Bell's Committee v. Board of Education of Harrodsburg*, 192 Ky. 700, 234 S.W. 311.

⁷ *Pitznogle v. Western Maryland R. Co.*, 119 Md. 673, 87 A. 917, 46 L.R.A., N.S., 319.

lature may in so conferring the power of eminent domain delegate to those upon whom it is conferred the final determination of those legislative questions upon which its own decision would be final if made by it, even without providing for a hearing thereon to the owners of the property that is to be taken.⁸ The courts have taken the position that, since an exercise of the power of eminent domain is in derogation of the common right, statutes authorizing the appropriation of private property thereunder are to be strictly construed.⁹

The exercise of the power of eminent domain is subject to important constitutional limitations. The Fifth Amendment to the federal Constitution expressly provides that private property may not be taken for a public use without just compensation. This provision applies only to an exercise of the power by or under the authority of the United States. The constitutions of most of the states, however, contain an equivalent provision, and, in addition, the due process clause of the Fourteenth Amendment to the federal Constitution imposes a similar limitation upon the exercise of this power by or under the authority of the several states. It is also held that neither the United States nor any of the states may authorize the power to be exercised to appropriate private property for non-public uses. Its exercise by or under the authority of a state is also subject to the general limitations on state action contained in the federal Constitution. It has, however, been held that the power of eminent domain is so essential a part of a state's sovereign powers that its legislature may not contract not to exercise it. A purported legislative contract not to exercise it in a given case is void, and the exercise of the power of eminent domain in derogation of the terms of such agreement does not invalidly impair the obligation of contracts within the meaning of the contract clause of the federal Constitution.¹⁰ But there have been state decisions in which the contract clause has been relied upon to defeat the appropriation of property, already dedicated by a private owner to a particular public use, for purposes of devoting it to another and inconsistent public use, although the due process clause is

⁸ *Rindge Co. v. Los Angeles County*, 262 U.S. 700, 43 S.Ct. 689, 67 L. Ed. 1186.

Minn. 197, 112 N.W. 395, 11 L.R.A., N.S., 105.

⁹ *Gillette v. Aurora Rys. Co.*, 228 Ill. 261, 81 N.E. 1005; *Minnesota Canal & Power Co. v. Pratt*, 101

¹⁰ *Contributors to Pennsylvania Hospital v. City of Philadelphia*, 245 U.S. 20, 38 S.Ct. 35, 62 L.Ed. 124.

also generally invoked to support such decisions.¹¹ The constitutions of some of the states subject the exercise of the power of eminent domain to limitations other than those based on the due process clause of the Fourteenth Amendment and comparable state constitutional provisions.¹² The principal problems of general importance are, however, those involving that due process clause and comparable clauses in state constitutions. The subsequent discussion will be almost wholly confined to their consideration.

The power of eminent domain is but one of those by an exercise of which government may take private property for its own purposes. The others are its regulatory power and its taxing power. An exercise of a government's regulatory powers generally does not involve an actual appropriation of private property by it, although it may at times involve that result. There is no constitutional principle requiring it to pay the owner even though the government's act in fact takes or destroys his property in such cases. The levy and collection of a tax transfer property from the taxpayer to the government, but there is no constitutional requirement that it make specific compensation to the taxpayer therefor. An exercise of the power of eminent domain usually involves an actual transfer to the taker of an interest in another's private property, although the concept of "taking" includes situations which would not normally be considered as involving that result but which can, nevertheless, be formally viewed as involving it. It is a constitutional requirement under our system that government make fair and specific compensation for any private property taken by an exercise of its power of eminent domain. It is usually not difficult to determine whether a taking of private property is referable to the one or the other of these powers. It is referable to the police or regulatory power if the taking is a mere incident to a valid regulation to promote the public interest; to the taxing power, if for the primary purpose of raising revenue to defray the costs of government; and to the power of eminent domain if it is taken primarily for the purpose of permitting the government, or its delegate, either to inflict an injury upon the very

¹¹ *Cary Library v. Bliss*, 151 Mass. 364, 25 N.E. 92, 7 L.R.A. 765; *Hall v. Fairchild-Gilmore-Wilton Co.*, 66 Cal. App. 615, 227 P. 649; *South Park Com'rs v. Montgomery Ward & Co.*, 248 Ill. 209, 93 N.E. 910, 21 Ann.Cas. 127.

¹² See, e. g., *Stearns v. City of Barre*, 73 Vt. 281, 50 A. 1086, 58 L.R.A. 240, 87 Am.St.Rep. 721.

property taken for a public use, or to utilize it for a public use other than the payment of governmental expenses. A taking under the taxing power is generally easily distinguished in practice from one under the power of eminent domain. There have, however, been many cases in which a police regulation has involved such serious limitations on private property rights for the public welfare that it has been difficult to determine whether it could be imposed without compensation as a police regulation or only with compensation as involving an exercise of the power of eminent domain.¹³ It is this that has been largely responsible for expanding the concept of the taking of property to include the permanent subjection of property under legislative authority to direct injuries materially and permanently impairing its uses and value.¹⁴ To treat such a situation as involving an exercise of the power of eminent domain spreads the costs of attaining the public benefit for which it was authorized more generally and equitably.

THE DOCTRINE OF PUBLIC USE

294. The federal government may exercise its power of eminent domain whenever its exercise is necessary for the accomplishment of an object within the scope of federal powers.
295. A state may exercise its power of eminent domain to take private property only if the taking is for a public use. The constitutional bases for this limitation are provisions in its own constitution and the due process clause of the Fourteenth Amendment to the federal Constitution.

General Considerations

The power of eminent domain may be exercised to appropriate private property for public uses only. This limitation applies to its appropriation by or under the authority of the United States as well as by or under the authority of a state. The federal government may exercise its power of eminent domain only so far as necessary and proper for carrying into execution the powers delegated to it by the Constitution. The decisions hold that it has the power whenever its exercise is necessary for the

¹³ See discussion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322, 28 A.L.R. 1321.

¹⁴ See *Richards v. Washington Terminal Co.*, 233 U.S. 546, 34 S.Ct. 654, 58 L.Ed. 1088, L.R.A.1915A, 887.

accomplishment of an object within the scope of federal power.¹⁵ Appropriation for a use that can be justified on that basis has invariably been expressly or impliedly held to be for a proper public use also.¹⁶ The formula is sufficiently elastic to permit a court to decide that an appropriation of private property for a clearly private use would not be one necessary for the accomplishment of an object within the scope of federal power.¹⁷ The validity of a state's exercise of its power of eminent domain has not in fact been determined by the formal test whether its exercise was necessary for the accomplishment of an object within the state's powers. A state has, for example, the power to promote the general welfare of its inhabitants, but the appropriation of private property as an incident to promoting that welfare by a particular method has more than once been held to involve a prohibited taking thereof for a non-public use. Thus it has been held that lands may not be condemned for resale as an incident to the creation of a business district adapted to a city's commercial needs,¹⁸ nor for the purpose of developing a supply of cheap electrical power for industrial uses solely.¹⁹ The fact that the use is reasonably necessary to promote the general welfare by the private development of a state's natural resources has, however, been held to justify an appropriation of private property as a taking for a public use,²⁰ and it can be stated that considerations of that kind are relevant to a decision of what constitute valid public uses. The constitutional bases for the requirement that a state may take private property for public uses

¹⁵ *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 16 S. Ct. 427, 40 L.Ed. 576; *Luxton v. North River Bridge Co.*, 153 U.S. 525, 14 S.Ct. 891, 38 L.Ed. 808.

¹⁶ See, in addition to cases in footnote 15, *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 10 S.Ct. 965, 34 L.Ed. 295; *Chappell v. United States*, 160 U.S. 499, 16 S.Ct. 397, 40 L.Ed. 510; *Brown v. United States*, 263 U.S. 78, 44 S.Ct. 92, 68 L.Ed. 171.

¹⁷ *United States v. Certain Lands in City of Louisville, Jefferson County, Ky.*, D.C., 9 F.Supp. 137, affirmed, 6 Cir., 78 F.2d 684 (holding that federal condemnation of lands in connection with a low-cost housing

and slum clearance project was invalid as exercising the power of eminent domain for a non-public use).

¹⁸ *In re Opinion of the Justices*, 204 Mass. 607, 91 N.E. 405, 27 L.R.A., N.S. 483.

¹⁹ *Brown v. Gerald*, 100 Me. 351, 61 A. 785, 70 L.R.A. 472, 109 Am.St. Rep. 526; see also statement in *Kaukauna Water Power Co. v. Green Bay & M. Canal Co.*, 142 U.S. 254, 12 S.Ct. 173, 35 L.Ed. 1004.

²⁰ *CLARK v. NASH*, 198 U.S. 361, 25 S.Ct. 676, 49 L.Ed. 1085, 4 Ann. Cas. 1171, *Black's Cas. Constitutional Law*, 2d, 599.

only are provisions in the state's own constitution and the provision of the Fourteenth Amendment to the federal Constitution that no state shall deprive any person of property without due process of law. A state may construe its own constitution so as to exclude uses that would be held proper under the due process clause of the Fourteenth Amendment, but it may not give even its own constitution an interpretation that would include a use that was not a public use within the meaning of the Fourteenth Amendment. Its position in this matter is similar to its position in defining what are valid public purposes for its exercise of its taxing powers. It should also be noted that the exercise of a state's power of eminent domain by its subordinate political subdivisions is limited to their exercise thereof for public uses pertaining to the particular subdivision exercising it.

Scope of the Concept of "Public Use"

The issue of what constitute valid public uses for which the power of eminent domain may be exercised has many points of similarity with that of what are valid public purposes for which the taxing power may be exerted. There is no precise rule or series of rules that can be deduced from the decisions on that issue. The generalizations in which attempts have been made to describe it permit widely different results in application. It is, however, possible to indicate recurring factors that affect the result. It is not essential to the existence of a public use that the use be by a public governmental agency. The cases permitting its exercise by a private corporation to acquire lands for use in a privately operated enterprise such as a railroad illustrate this point.²¹ Nor does the fact that a public governmental agency is itself to use the property mean that the use is public. The denial to a municipality of the right to condemn private property for resale to private persons as an incident to establishing a suitable business district illustrates this principle.²² The significant factors focus about the character of the use rather than that of the user. Where the state itself, one of its political subdivisions, or a public agency, assumes to condemn private property for use in performing a function imposed upon it, the issue of public use is generally determinable by whether the particular function is a proper governmental function. It is accordingly impossible to deal rationally with the "public use"

²¹ *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 10 S.Ct. 965, 34 L.Ed. 295.

²² *In re Opinion of the Justices*, 204 Mass. 607, 91 N.E. 405, 27 L.R.A., N.S., 483.

issue without taking into account prevailing theories as to the proper functions of government. There are certain functions that have been customarily performed by the governments of our states or their political subdivisions. The condemnation of property for use in connection with their performance is invariably held to be for a public use. A state or its political subdivisions may, accordingly, condemn property required for the construction of state or municipal office buildings,²³ public hospitals,²⁴ and public parks.²⁵ Private property may also be condemned for purposes of constructing public highways and streets. This has never been questioned. It is, however, generally held that it may not be condemned for the purpose of constructing a purely private highway.²⁶ It is sometimes difficult to determine whether a given highway is public or purely private. A road is generally held to be a public highway if open for use by the general public even though in fact likely to be used by but a small portion thereof or even by a single person.²⁷ A road is not prevented from being public by the fact that it is constructed for pleasure, rather than business or commercial use.²⁸ As the functions of government have expanded to include activities not traditionally undertaken by it, the scope of public uses has correspondingly expanded. A great many of these activities have consisted of new ways of using governmental power to accomplish the same general objectives aimed at by the performance of the more traditional activities and functions. They have at times consisted in creating special governmental districts for the construction and operation of such specialized types of public improvements as drainage and irrigation works. The condemnation of land, or an interest therein, for the construction of such works has been generally sustained as for a public use wherever the right to the benefits therefrom has been open to all within the districts capable of benefiting from the improvement.²⁹ The

²³ *Mercer County v. Wolff*, 237 Ill. 74, 86 N.E. 708; *Board of Supervisors of Norfolk County v. Cox*, 98 Va. 270, 36 S.E. 380.

²⁴ *Manning v. Bruce*, 186 Mass. 282, 71 N.E. 537.

²⁵ *Shoemaker v. United States*, 147 U.S. 282, 13 S.Ct. 361, 37 L.Ed. 170.

²⁶ *Nesbit v. Trumbo*, 39 Ill. 110, 89 Am.Dec. 290; *Arnsperger v. Crawford*, 101 Md. 247, 61 A. 413, 70 L.R.

A. 497; *Sadler v. Langham*, 34 Ala. 311.

²⁷ *Rindge Co. v. Los Angeles County*, 262 U.S. 700, 43 S.Ct. 689, 67 L. Ed. 1186; *Towns v. Klamath County*, 33 Or. 225, 53 P. 604.

²⁸ *Higginson v. Inhabitants of Town of Nahant*, 11 Allen, Mass. 530.

²⁹ *Fallbrook Irr. Dist. v. Bradley*, 164 U.S. 112, 17 S.Ct. 56, 41 L.Ed.

activities have at other times been of a character frequently carried on by private enterprise such as furnishing the inhabitants of a municipality with water, gas or electricity. It has been almost universally held that these are proper governmental activities, and that even private corporations may be authorized to condemn property to be used for such purposes.³⁰ The condemnation of private property for similar purposes by the public itself is also valid. It has been said in a case not involving the present issue that a state may engage in any business, now generally conducted by private enterprise, if the legislature considers it for the general public good for the state to engage therein.³¹ It may well be that it will ultimately be held that, at least so far as the due process clause of the Fourteenth Amendment is concerned, a state may condemn property for use in conducting any such business as it might undertake to operate. This would considerably expand conceptions of public use as defined in many past decisions.

The existence of a valid public use has frequently been supported on the basis that the property taken was to be used by the general public. There have been two principal types of use generally held to involve such use by the general public. The one of these has consisted in the direct use of the property by a governmental agency in the performance of its functions such as the use of an office building by governmental agencies. The other has consisted in the use of the property by the general public itself as in the case of public roads and parks. The inadequacy of use by the general public as a test is now very generally recognized. The test is still of value in the sense that the presence of such use furnishes an adequate basis for a conclusion that a valid public use exists. It is applied in this sense to sustain the condemnation of private property by private parties for use in providing the public generally with such services as transportation, water, gas, light and power.³² The use by the general public in such cases consists in its right to use these

369; *Bradbury v. Vandalia Levee & Drainage Dist.*, 236 Ill. 36, 86 N.E. 163, 19 L.R.A.,N.S., 991, 15 Ann.Cas. 904; *Prescott Irrigation Co. v. Flathers*, 20 Wash. 454, 55 P. 635.

³⁰ *Jacobs v. Clearview Water Supply Co.*, 220 Pa. 388, 69 A. 870, 21 L.R.A.,N.S. 410; *Minn. Canal & Power Co. v. Pratt*, 101 Minn. 197, 112

N.W. 395; *Charlestown Natural Gas Co. v. Lowe*, 52 W.Va. 662, 44 S.E. 410.

³¹ *Chas. Wolff Packing Co. v. Court of Industrial Relations of State of Kansas*, 262 U.S. 522, 43 S.Ct. 630, 67 L.Ed. 1103, 27 L.R.A. 1280.

³² See cases in footnote 30.

services at reasonable rates. The test, however, is no longer valid in the sense that the absence of the possibility of such general public use necessarily means the absence of the constitutionally requisite public use. It is frequently sufficient if the use to which the private condemnor is to put the property is one of widespread general public benefit not involving any right on the part of the general public itself to use the property. The adoption of this general test has expanded the scope of valid public uses to include uses by private parties in purely private activities. The public benefit that has been relied upon to sustain such exercises of the power of eminent domain has usually consisted in that derived from the development of a state's important natural resources rendered possible by such exercises of that power. It is on that basis that one private person has been permitted to condemn land for the purpose of conveying water in ditches across that land in order to properly irrigate his own,³³ and to condemn a right of way across another's land for an aerial bucket line necessary for the working of the condemnor's mine.³⁴ The same considerations are frequently invoked in sustaining the condemnation of property required by drainage or irrigation districts for the accomplishment of their objectives,³⁵ and the condemnation of land and water rights to be used for developing power for general public distribution.³⁶

The test last discussed is thus seen to be employed even where the ordinary test of general public use would sustain the condemnation of private property. It may, accordingly, be taken to be an important factor in determining whether any taking of private property is for a proper public use. Its limits remain vague and undetermined. It cannot be permitted to justify every appropriation by one person of another's property merely because the former's use would promote an increased utilization of some natural resource of the state, nor because the use might represent an economic benefit to the state. The principle

³³ CLARK v. NASH, 198 U.S. 361, 25 S.Ct. 676, 49 L.Ed. 1085, 4 Ann. Cas. 1171, Black's Cas. Constitutional Law, 2d, 599.

³⁴ Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, 26 S.Ct. 301, 50 L.Ed. 581, 4 Ann.Cas. 1174. For other applications of the same general theory, see Maffett v. Quine, 9 Cir., 93 F. 347; Potlatch Lumber

Co. v. Peterson, 12 Idaho 769, 88 P. 426, 118 Am.St.Rep. 233.

³⁵ Fallbrook Irr. Dist. v. Bradley, 164 U.S. 112, 17 S.Ct. 56, 41 L.Ed. 369; Talbot v. Hudson, 16 Gray, Mass., 417.

³⁶ Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30, 36 S.Ct. 234, 60 L.Ed. 507.

has considerably modified the scope of the well established rule that the power of eminent domain may not be used primarily to transfer private property from one owner to another for the private use of the latter, but it has not completely abolished that rule. Every condemnation of property by a private party for use by him necessarily involves its exercise for his private benefit. It is only where his use of it either involves as well its use by the general public or benefits the general public that the property is deemed taken for a proper public use. It is invariably a question of degree whether the public benefits resulting from a private use of condemned property are sufficiently important to outweigh the private benefits derived therefrom by the condemnor. There have been many decisions in which the private benefits have been deemed to outweigh the public benefits so greatly that the taking has been held to be not for a valid public use. Statutes authorizing the condemnation of railroad property for the construction of private elevators,³⁷ requiring the construction of private industry tracks or spurs or other facilities at the railroad's expense,³⁸ and authorizing the extinguishment of irredeemable ground rents at the expense of the present owners of the lands,³⁹ have all been held to involve an appropriation of private property for non-public uses. It is immaterial where this balance between private and public benefits exists whether the appropriation is by the public itself or by a private party under public authorization. Hence the appropriation by the public of one person's property for resale to another private person for purely private uses is invalid.⁴⁰ However, if the resale is merely incidental to the accomplishment of a valid public end, such as the promotion of the public health, the resale will not prevent the existence of a valid public use.⁴¹

³⁷ *Missouri Pac. R. Co. v. Nebraska ex rel. Board of Transportation*, 164 U.S. 403, 17 S.Ct. 130, 41 L.Ed. 489.

³⁸ *Missouri Pac. R. Co. v. Nebraska*, 217 U.S. 196, 30 S.Ct. 461, 54 L.Ed. 727, 18 Ann.Cas. 989. See also *Litchfield & M. R. Co. v. Alton & S. R. R.*, 305 Ill. 388, 137 N.E. 248 (cannot condemn lands for private spur track); cf. *Union Lime Co. v. Chicago & N. W. R. Co.*, 233 U.S. 211, 34 S.Ct. 522, 58 L.Ed. 924 (can condemn if spur is to become part of company's public track system).

³⁹ *Appeal of Palairret*, 67 Pa. 479, 5 Am.Rep. 450.

⁴⁰ In re Opinion of the Justices, 204 Mass. 607, 91 N.E. 405, 27 L.R.A., N.S. 483; *Salisbury Land & Improvement Co. v. Commonwealth*, 215 Mass. 371, 102 N.E. 619, 46 L.R.A., N.S. 1196.

⁴¹ *Dingley v. City of Boston*, 100 Mass. 544. See also *Moore v. Sanford*, 151 Mass. 285, 24 N.E. 323, 7 L.R.A. 151 (resale for railroad purposes valid).

It has also been held that private property may be condemned to be turned over to other private persons in compensation for property taken from the latter, where this is the best means of making the latter whole.⁴² However, the situations in which the property of one person may be condemned with a view to ultimately transferring it to another for his private use are very limited.⁴³ It is on this basis that excess condemnation is generally held invalid.⁴⁴ The principle does not prevent the public from selling property acquired by condemnation when no longer needed for public use.

The question has at times arisen whether a state may condemn land for the purpose of transferring it to the federal government for use by it in carrying on its governmental powers. There were several comparatively early decisions holding that a state could not condemn property for transfer to the United States for lighthouse or post-office purposes.⁴⁵ A comparatively recent decision held that a state could condemn property for transfer to the United States for use in establishing a national park located within the state.⁴⁶ It was stated that the state could validly condemn property to establish public parks, and that the use did not cease to be a valid state public use merely because the state availed itself of the agency of the United States to do so. It was also urged in support of the decision that the proposed use by the United States would be for the benefit of the state. The latter of these reasons would permit a much more extensive use of this device than would be possible under the limitations

⁴² *Brown v. United States*, 263 U.S. 78, 44 S.Ct. 92, 68 L.Ed. 171; see also *Pitznogle v. Western Maryland R. Co.*, 119 Md. 673, 87 A. 917, 46 L.R.A.,N.S. 319.

⁴³ See discussion in *Salisbury Land & Improvement Co. v. Commonwealth*, 215 Mass. 371, 102 N.E. 619, 46 L.R.A.,N.S. 1196.

⁴⁴ *Pennsylvania Mut. Life Ins. Co. v. City of Philadelphia*, 242 Pa. 47, 88 A. 904, 49 L.R.A.,N.S. 1062; *Cincinnati v. Vester*, 6 Cir., 33 F.2d 242, 68 A.L.R. 831; *Bond v. City of Baltimore*, 116 Md. 683, 82 A. 978; *In re Opinion of Justices*, 204 Mass. 616, 91 N.E. 578. The constitutions of

some of the states expressly permit it.

⁴⁵ *People ex rel. Trombley v. Humphrey*, 23 Mich. 471, 9 Am.Rep. 94; *Darlington v. United States*, 82 Pa. 382, 22 Am.Rep. 766; see also *Rockaway Pacific Corporation v. Stotesbury*, D.C., 255 F. 345.

⁴⁶ *Via v. State Commission on Conservation and Development of State of Virginia*, D.C., 9 F.Supp. 556. See also *Rudacille v. State Commission on Conservation and Development*, etc., 155 Va. 808, 156 S.E. 829; *Yarborough v. North Carolina Park Commission*, 196 N.C. 284, 145 S.E. 563; *Lancey v. King County*, 15 Wash. 9, 45 P. 645, 34 L.R.A. 817.

implicit in the former reason, since the state might well derive benefits from a federal use of property even though the state itself could not perform the function in the performance of which it was used by the federal government. The federal government could itself condemn any private property within a state required for the execution of federal powers, but the device now being considered enables it and a state to co-operate in prosecuting an activity within the scope of the powers of both, and in which both may be interested, by sharing the expenses involved.

The question whether private property is being condemned for a proper public use is ultimately one of state and federal constitutional law in every case in which it is being taken under authority of a state. It is, therefore, ultimately a judicial question. The courts of a state have the final authority to define what are public uses within the meaning of the state's constitution, but they may not so construe it as to include uses that are not such within the purview of the due process clause of the Fourteenth Amendment to the federal Constitution. There is, however, small likelihood that the federal Supreme Court will hold any use prohibited by that clause which the state courts have held valid under the state's constitution. The Supreme Court has adopted the position that local conditions constitute important factors in what is a proper public use, and it has consistently applied that doctrine in deciding cases that have come before it. The decisions of a state's highest court have in practice been permitted to determine the law as to the uses for which the state may authorize the condemnation of private property.⁴⁷

WHAT PROPERTY MAY BE TAKEN

296. All private property is held subject to the power of eminent domain, whether it be realty or personalty, tangible or intangible. Franchises and contracts are deemed property in this connection.
297. The general rule is that property may be condemned for a public use regardless of who owns it. The property of the United States may not, however, be condemned under authority derived from a state, but that of a state appears to be to some extent capable of being condemned under authority derived from the United States.

⁴⁷ As illustrative of this attitude on the part of the federal Supreme Court, see *Fallbrook Irr. Dist. v. Bradley*, 164 U.S. 112, 17 S.Ct. 56,

41 L.Ed. 369, and *Clark v. Nash*, 198 U.S. 361, 25 S.Ct. 676, 49 L.Ed. 1085, 4 Ann.Cas. 1171.

298. It is also the general rule that property already devoted to one public use may be condemned for a substantially different public use, but some courts have limited the extent to which it may be condemned for substantially the same use.

Territorial Scope of the Power of Eminent Domain

The United States can exercise its power of eminent domain as a matter of right within any state or within any territory subject to the jurisdiction of the United States. It may undoubtedly exercise it elsewhere with the consent of the sovereign power of the place in which the property is situated. A state can exercise its power of eminent domain as a matter of right only within its own territorial limits, since these define the limits of all of its sovereign powers. It has the undoubted power to exercise it within the territorial limits of another state with the consent of the latter's proper authorities. No state is, however, required by any federal constitutional provision to grant another one of the states such consent. Whenever a government is permitted to exercise the power of eminent domain beyond its own territorial jurisdiction, it does so as the delegatee of the government in whose territory is situated the property that is taken.

Property of State and United States

The United States may condemn any property situated within a state if it is owned by private persons even though it is already used by them for a public use. It has thus been held that it might condemn for a national park the property of a privately operated railroad situated within a state.⁴⁸ A different question arises where the property sought to be condemned by it is owned by the state, one of its political subdivisions, or one of its agencies. There have been cases in which the federal government has been allowed to condemn the public streets of one of the state's municipalities.⁴⁹ No case has been found in which it has been permitted to condemn property used by the state itself in the performance of its strictly governmental functions. A similar question arises when the state or one of its agencies seeks to condemn federally owned property located within it. It was intimated in an early case that "land within a state purchased by the United States as a mere proprietor, and not reserved

⁴⁸ *United States v. Gettysburg Electric Ry. Co.*, 160 U.S. 668, 16 S.Ct. 427, 40 L.Ed. 576.

⁴⁹ *Town of Nahant v. United States*, 1 Cir., 136 F. 273, 70 C.C.A. 641, 69 L.R.A. 723.

or appropriated to any special purpose, may be liable to condemnation for streets or highways, like the land of other proprietors, under the right of eminent domain." The decision, however, held that this did not apply to the lands in question which were being used for a federal purpose.⁵⁰ The foregoing intimation has been definitely repudiated, and it has been asserted that state laws relating to the exercise of the power of eminent domain did not apply to lands comprising part of the federal domain within a state.⁵¹ The lands in question were not being used for any particular governmental purpose. The Court considered that the federal government alone had the power to dispose of federal property. That reason would prevent its condemnation even by the state itself for use in performing its governmental functions. The decisions in this field have been too few to warrant any dogmatic statement as to how far each government is prohibited from taking the other's property by condemnation proceedings.⁵² The extent to which a state may condemn the property of its political subdivisions, or authorize them to condemn its property, is wholly a matter for each state to determine for itself.

Kinds of Property Which May Be Taken

It is generally stated that all private property is held subject to the power of eminent domain regardless of its character and the uses to which it is being put at the time of its appropriation. It is sometimes a question whether that which is sought to be taken constitutes property or private property. The answers to those questions depend upon the law of the jurisdiction in which the property is situate. If that law, for example, subjects lands to a servitude in favor of the public, the exercise of that privilege by the public does not amount to a taking of private property since the owner's property rights in such lands do not include an immunity from such public use thereof. It has, accordingly, been held that, where the laws of a state give the public an easement in riparian lands to go thereon without their owner's consent for purposes of constructing and repairing levees, the due process clause of the Fourteenth Amendment does not require compensation for such use of those lands, since no

⁵⁰ United States v. Chicago, 7 How. 185, 12 L.Ed. 660.

United States, 243 U.S. 389, 37 S.Ct. 387, 61 L.Ed. 791.

⁵¹ Utah Power & Light Co. v.

⁵² See also Chapter 4, Sections 83-86.

property interest of their owner was taken by such use.⁵³ The same case held that it is immaterial whether the owner's title was immediately or ultimately derived from the state or the United States. If, however, the law of a state recognizes a given system of legal relations as property, then it is subject to condemnation if privately owned. It is immaterial whether it is realty or personalty, tangible or intangible.⁵⁴ A franchise such as that possessed by a public utility to operate within a given town or district is property that may be condemned,⁵⁵ as is a contract.⁵⁶ The argument is frequently made when property of such types is taken that the statute authorizing its appropriation impairs the obligation of the contracts in violation of the contract clause. The almost invariable answer thereto has been that the appropriation of a contract for the public use instead of impairing its obligation recognizes it since the contract is taken as an existing, enforceable obligation.⁵⁷ An agreement by which the state seeks to limit the exercise of the power of eminent domain under its authority is not unconstitutionally impaired by action in violation thereof since the courts have refused to recognize it as a contract, holding that a state is powerless to contract away its power of eminent domain.⁵⁸ Although the power of eminent domain is most frequently exerted to condemn realty, an interest therein, or a right appurtenant thereto, it may be exercised to condemn personalty as well. Hence, it has been held proper to authorize the condemnation of the minority shares of a railroad corporation by another railroad company which was the majority shareholder in the former.⁵⁹ The right to condemn private property thus depends not upon its character but upon whether it is being taken for a public use. Whether it is needed therefor clearly does not de-

⁵³ *Eldridge v. Trezevant*, 160 U.S. 452, 16 S.Ct. 345, 40 L.Ed. 490.

⁵⁴ *City of Cincinnati v. Louisville & N. R. Co.*, 223 U.S. 390, 32 S.Ct. 267, 56 L.Ed. 481.

⁵⁵ *LONG ISLAND WATER-SUPPLY CO. v. CITY OF BROOKLYN*, 166 U.S. 685, 17 S.Ct. 718, 41 L.Ed. 1165, *Black's Cas. Constitutional Law*, 2d, 596.

⁵⁶ *LONG ISLAND WATER-SUPPLY CO. v. CITY OF BROOKLYN*, 166 U.S. 685, 17 S.Ct. 718, 41 L.Ed.

1165, *Black's Cas. Constitutional Law*, 2d, 596; *City of Cincinnati v. Louisville & N. R. Co.*, 223 U.S. 390, 32 S.Ct. 267, 56 L.Ed. 481.

⁵⁷ *City of Cincinnati v. Louisville & N. R. Co.*, 223 U.S. 390, 32 S.Ct. 267, 56 L.Ed. 481.

⁵⁸ *Contributors to Pennsylvania Hospital v. City of Philadelphia*, 245 U.S. 20, 38 S.Ct. 35, 62 L.Ed. 124.

⁵⁹ *Offield v. New York, N. H. & H. R. Co.*, 203 U.S. 372, 27 S.Ct. 72, 51 L.Ed. 231.

pend upon its character as realty or personalty, tangible or intangible property. Nor does the right to condemn property depend upon who owns it except insofar as that is a factor in the problem of the right of a state to condemn federal property and of the federal government to condemn the property of a state or its political subdivisions and agencies. One state may, however, condemn the property of another situated in the former and used for private purposes by its owner.⁶⁰ This in effect permits it to condemn any property held by another state within it, since one state cannot act as a sovereign within the territorial limits of another.

Private property which is already being devoted to a public use is not immune from another exercise of the power of eminent domain merely because of that fact. If the new use is one that will not unreasonably interfere with that for which the property is already being used, the power to condemn for the new use is never denied merely on that basis. Thus telegraph companies have been permitted to condemn a right of way for their lines over or along the right of way of railroad companies,⁶¹ and one railroad company to acquire a right to cross the tracks of another.⁶² It is also generally held that property already devoted to one public use may be condemned for another, though the second use will render impossible the continuance of the former use, if the two uses are substantially different. Thus the United States has been permitted to condemn railway property for use as a national park.⁶³ There is an important class of cases in which property already devoted to a public use was sought to be condemned by another who was to put it to substantially the same use. This represents a use of the power of eminent domain to substitute one owner for another in the employment of the property for substantially the same public use, and is sometimes held invalid on the theory that the second appropriation is one for a purely private use.⁶⁴ There are, however, cases reaching an opposite result on the theory that,

⁶⁰ *State of Georgia v. City of Chattanooga*, Tenn., 264 U.S. 472, 44 S.Ct. 369, 63 L.Ed. 796.

⁶¹ *Pacific Postal Tel. Cable Co. v. Oregon & C. R. Co.*, 9 Cir., 163 F. 967.

⁶² *Lake Shore & M. S. R. Co. v. Chicago & W. I. R. Co.*, 97 Ill. 506; *Union Pac. R. Co. v. Leavenworth, N. & S. R. Co.*, 10 Cir., 29 F. 728.

⁶³ *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 16 S.Ct. 427, 40 L.Ed. 576.

⁶⁴ *Suburban R. Co. v. Metropolitan West Side El. R. Co.*, 193 Ill. 217, 61 N.E. 1090; *State ex rel. Union Trust & Savings Bank v. Superior Court for Spokane County*, 84 Wash. 20, 145 P. 999, 149 P. 324.

when the enjoyment of two public rights would to some extent interfere with each other, it is for the legislature to determine which shall yield, and to what extent it shall yield, to the other.⁶⁵ The former of these theories would not in any case prevent the public itself from condemning a privately operated public utility property for the purpose of its public ownership and operation.⁶⁶ Nor is it deemed to include a case in which the purpose of the condemnation is not to oust the existing owner from his use of the property but rather to require him to permit another also to use it for the same purpose. A case of this kind arises when one railroad condemns a right to use a part of another's tracks or facilities jointly with the existing owner. This is generally held valid since it does not involve any substitution of ownership but rather the creation in another of a property right exercisable without unreasonable interference with the existing use of the property.⁶⁷ If property has been donated to the public dedicated to a particular public use, some state decisions have held it immune from condemnation for either the same or a different public use,⁶⁸ but neither the due process clause of the Fourteenth Amendment nor the contract clause would be violated by condemning it for a different public use.⁶⁹ The Supreme Court has never decided whether those constitutional provisions would be violated if the whole of the dedicated property were condemned merely to substitute one owner for another, the use remaining unchanged.

Extent of Appropriation

The general rule is that no more property shall be taken under the power of eminent domain, either in respect to quantity or interest, than is needed for the particular purpose for which the property is to be used. The public is not required to condemn more than that required for such purpose. It is valid for the

⁶⁵ *Eastern R. Co. v. Boston & M. R.*, 111 Mass. 125, 15 Am.Rep. 13; *St. Louis, H. & K. C. Ry. Co. v. Hannibal Union Depot Co.*, 125 Mo. 82, 28 S.W. 483.

⁶⁶ *LONG ISLAND WATER-SUPPLY CO. v. CITY OF BROOKLYN*, 166 U.S. 685, 17 S.Ct. 718, 41 L.Ed. 1165, *Black's Cas. Constitutional Law*, 2d, 596.

⁶⁷ *Pennsylvania R. Co. in Mary-*

land v. Baltimore & O. R. Co., 60 Md. 263.

⁶⁸ *Hall v. Fairchild-Gilmore-Wilton Co.*, 66 Cal.App. 615, 227 P. 649; *Cary Library v. Bliss*, 151 Mass. 364, 25 N.E. 92, 7 L.R.A. 765; *South Park Com'rs v. Montgomery Ward & Co.*, 248 Ill. 209, 93 N.E. 910, 21 Ann.Cas. 127.

⁶⁹ *City of Cincinnati v. Louisville & N. R. Co.*, 223 U.S. 390, 32 S.Ct. 267, 56 L.Ed. 481.

public to exercise its power of eminent domain for the establishment of easements in private property bordering on a public square,⁷⁰ or as an incident to establishing a zoning system with respect to the use of private property.⁷¹ The principal issue in these cases was whether these were exercises of the power for the public use, not whether the public could take less than a fee in condemning real property. Its power to do that has invariably been conceded. A more common objection is that the authorization is invalid as permitting more to be condemned than is necessary. It is generally held that the legislature is the sole judge of both the amount of property and the estate therein required for the public use.⁷² This is true except insofar as the amount authorized to be taken is so clearly excessive as to warrant the inference that the principal purpose for taking it is not a proper public use. The excess condemnation cases heretofore considered illustrate this limitation.⁷³

WHEN PROPERTY IS DEEMED TO HAVE BEEN TAKEN

299. It is not essential in order that there be a taking of property that there be a formal transfer of it or some interest therein to the public or to another for public use. The destruction or material impairment of any interest in property as the direct result of an act of the public or by its authority is a taking of property unless that act is the exercise of a superior public right.
300. The owner of property is not entitled to be compensated for incidental, indirect, or consequential injuries to his property resulting from the lawful acts of the public or those authorized by it. A rule requiring compensation for such injuries prevails in some states by virtue of an express provision in their constitutions that just compensation shall be made for property taken or damaged for the public use.

General Considerations

The due process clause of the Fourteenth Amendment requires compensation only if private property is taken for a

⁷⁰ Attorney General v. Williams, 174 Mass. 476, 55 N.E. 77, 47 L.R.A. 314.

⁷¹ State ex rel. Twin City Bldg. & Inv. Co. v. Houghton, 144 Minn. 1, 174 N.W. 885, 176 N.W. 159, 8 A.L.R. 585.

⁷² FAIRCHILD v. CITY OF ST. PAUL, 46 Minn. 540, 49 N.W. 325, Black's Cas. Constitutional Law, 2d, 594.

⁷³ See supra, Sections 294-295.

public use. It does not require a state to make compensation for every injury or loss inflicted upon private persons by its actions even where the injury or loss is in respect to their property interests. The federal Constitution imposes on a state no duty to make compensation for the indirect and consequential damages resulting from its exercise of its powers.⁷⁴ The limitations imposed on the federal government by the Fifth Amendment similarly do not require it to make compensation for such damages resulting from its exercise of its powers.⁷⁵ It is, however, recognized that an exercise of governmental power may inflict injury and damage upon property of so direct, extensive and permanent a character as to require the government to make compensation therefor in the same manner as if it had actually acquired a right to inflict that injury by formal condemnation proceedings.⁷⁶ There is thus a limit upon the power of both the states and the United States to inflict uncompensated injuries upon private property rights. The problem of defining that limit has been formulated as that of determining when the injury ceases to be indirect and consequential and becomes sufficiently direct and extensive so as to amount to a taking of the injured property rights.

What Constitutes Taking of Property

There is no difficulty in finding the requisite taking where a recognized property interest in a person's property is acquired by the public or another person acting under public authorization. It is immaterial in such case whether the interest is acquired through formal condemnation proceedings or by some informal proceedings implying the assertion by the public, or under its authority, of a right to enter upon or use another's property.⁷⁷ In the absence of formal condemnation proceedings it is frequently difficult to determine whether the acts of the government, or of those acting by its authority, amount to an assertion of a right to use another's property or to subject it to burdensome servitudes that limit or destroy the owner's beneficial use thereof. This problem is well illustrated by two

⁷⁴ *Manigault v. Springs*, 199 U.S. 473, 26 S.Ct. 127, 50 L.Ed. 274.

⁷⁵ *Gibson v. United States*, 166 U.S. 269, 17 S.Ct. 578, 41 L.Ed. 996; *Seranton v. Wheeler*, 179 U.S. 141, 21 S.Ct. 48, 45 L.Ed. 126.

⁷⁶ *United States v. Cress*, 243 U.S. 316, 37 S.Ct. 380, 61 L.Ed. 746; *Eaton v. Boston, C. & M. R. R.*, 51 N.H. 504, 12 Am.Rep. 147.

⁷⁷ See *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 43 S.Ct. 135, 67 L.Ed. 287.

cases growing out of the federal government's installation of a coast defense battery and the firing of projectiles during peace time over privately owned lands. It was held in one of the cases that the mere installation of the battery coupled with an occasional firing across those lands afforded no basis for inferring an intention on the government's part to impose upon the lands a servitude in its behalf, particularly in the absence of any proof showing an intention to regularly use the battery for practice purposes.⁷⁸ In a subsequent case involving the same situation the Court announced the principle that if the battery had been installed with the purpose and effect of subordinating the lands to the government's right of firing across it for the purposes of practice or otherwise, whenever it saw fit in time of peace, and with the result of depriving the owners of their profitable use, "the imposition of such a servitude would constitute an appropriation of property for which compensation should be made."⁷⁹ The same principles are applied for determining whether the acts of private persons, acting under governmental authorization, amount to a taking where there has been no formal condemnation of a right to subject another's property to the burden resulting from those acts.⁸⁰

It is not, however, sufficient in order to prove that property has been taken to show that a direct injury has been inflicted upon the property or that a serious interference with the owner's right to use it has resulted from acts of the public or under its authority. The right of private property is subject to public regulation which in fact permits government to impose extremely burdensome restrictions upon an owner's right to use his property without being entitled to compensation therefor, as is done in the case of zoning ordinances. It is in some cases also limited by the existence of certain public rights or easements therein. Thus the ownership of the bed of a navigable stream is held subject to the public right of navigation. This public right includes not only the right of the general public to use it therefor but that of the government to make improvements in aid thereof. The government's right is superior to that of the private

⁷⁸ *Peabody v. United States*, 231 U. S. 530, 34 S.Ct. 159, 58 L.Ed. 351.

ment had authority to do the acts relied on.

⁷⁹ *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 43 S.Ct. 135, 67 L.Ed. 287. It is necessary in cases of this character to prove that the agents of the govern-

⁸⁰ *EATON v. BOSTON, C. & M. R. R.*, 51 N.H. 504, 12 Am.Rep. 147, *Black's Cas. Constitutional Law*, 2d, 602.

owner, and its exercise is not deemed a taking of any of the latter's property even though it in fact involves its destruction or renders it unfit for the uses to which the owner might wish to put it. The destruction of any oyster bed as an incident to dredging navigable waters for the purposes of navigation has thus been held to involve no appropriation of private property requiring compensation under the Fifth Amendment.⁸¹ The government may also place thereon structures in aid of navigation.⁸² It may also interfere for purposes of navigation with any of a riparian owner's rights with respect to the waters of a navigable stream flowing past his land so far as these exist under the applicable law.⁸³ The same principle holds with respect to any other public rights to use the waters of a navigable stream. It has, for instance, been held that a riparian owner's rights are subordinate to the public right to take the waters for such public uses as furnishing a city with a supply of water for use by it and its inhabitants.⁸⁴ The diversion of the water for such purpose would not constitute a taking of any right of a riparian owner on such stream where that is the law. If the law of the state in which land is situated gives the public authorities a right to enter thereon for certain purposes, an exercise thereof is not a taking of private property however much it may involve an actual use by the public of the physical thing with respect to which the rights of private ownership exist.⁸⁵

The cases considered in the two preceding paragraphs indicate the important general approaches to the problem of when governmental acts amount in law to a taking of private property for which compensation must be made. The decision in some of them was reached by so defining the scope of the private owner's rights as to exclude that claimed to have been taken; that in others by referring the acts of the public to a superior public right to use or injure private property rights exercisable only until the public exercises its superior right; and

⁸¹ *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. 82, 33 S.Ct. 679, 57 L.Ed. 1083, Ann.Cas. 1915A, 232.

⁸² *Hawkins Point Light-House Case*, 4 Cir., 39 F. 77; *Scranton v. Wheeler*, 179 U.S. 141, 21 S.Ct. 48, 45 L.Ed. 126.

⁸³ See *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S.

53, 33 S.Ct. 667, 57 L.Ed. 1063, to the effect that a riparian owner has no property rights in the running water of a navigable stream.

⁸⁴ *Minneapolis Mill Co. v. Board of Water Com'rs of City of St. Paul*, 56 Minn. 485, 58 N.W. 33. Not all states recognize such a public right.

⁸⁵ *Eldridge v. Trezevant*, 160 U.S. 452, 16 S.Ct. 345, 40 L.Ed. 490.

that in others by denying that the acts of the public amounted to a taking of what was recognized as property. The first approach rests on the fundamental principle that the law must recognize that which is alleged to be taken as a property right before the public's acts can be deemed a taking of property. The concept of property most useful in this connection is that it is a bundle of rights, powers, privileges and immunities.⁸⁶ Its content depends upon the law of the state in which the property is situated.⁸⁷ This aspect of the general problem has been frequently stressed where the public has undertaken or authorized the diversion of waters in both non-navigable and navigable streams, or the construction of improvements therein affecting the interests of riparian owners. There is greater uniformity in the law of the different states as to a riparian owner's rights in non-navigable streams than in navigable streams. Their detailed consideration is beyond the purview of this text. It is sufficient to note that the riparian owner's property is deemed taken if the acts of the public, or of others under its authority, amount to a destruction or material impairment of any of those rights.⁸⁸ The rights of a riparian owner on a navigable stream or body of water are quite generally held to include that of access to the navigable part thereof.⁸⁹ This includes a right to construct suitable structures on and in front of his land and to extend the same into the stream to the point of navigability, subject only to the superior public right of navigation. A destruction or impairment of his exercise of that right that cannot be justified on the basis of some superior public right is deemed a taking of property.⁹⁰ Another large class of cases in which the principal issues were concerned with whether the rights claimed to be injured constituted property is that in-

⁸⁶ See *EATON v. BOSTON, C. & M. R. R.*, 51 N.H. 504, 12 Am.Rep. 147, Black's Cas. Constitutional Law, 2d, 602.

⁸⁷ *SAUER v. PEOPLE OF STATE OF NEW YORK*, 206 U.S. 536, 27 S. Ct. 686, 51 L.Ed. 1176, Black's Cas. Constitutional Law, 2d, 611.

⁸⁸ See, for example, *Harding v. Stamford Water Co.*, 41 Conn. 87; *Hogg v. Connellsville Water Co.*, 168 Pa. 456, 31 A. 1010; *Anderson v.*

Cincinnati Southern Ry., 86 Ky. 44, 5 S.W. 49, 9 Am.St.Rep. 263.

⁸⁹ *Illinois Cent. R. Co. v. People of State of Illinois*, 146 U.S. 387, 13 S. Ct. 110, 36 L.Ed. 1018; *Union Depot, etc., Co. v. Brunswick*, 31 Minn. 297, 17 N.W. 626, 47 Am.Rep. 789. See also statement in *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 33 S.Ct. 667, 57 L.Ed. 1063.

⁹⁰ *Yates v. Milwaukee*, 10 Wall. 497, 19 L.Ed. 984.

volving the rights of owners of property abutting on public streets. The general rule prevailing in the states is that there are appurtenant to land abutting upon city streets easements of light and air and access, whether or not its owner owns the fee in the street.⁹¹ The last of these is generally held to extend far enough to afford access to the general public street system.⁹² The practical destruction or material impairment of these rights by building structures on the street in front of a person's property, whether by the public or under its authority, amounts to a taking of property except where it is done in the exercise of a superior public right to use or improve the street for highway purposes. The construction of elevated railroads for commercial purposes which results in depriving abutting property of any or all of these rights constitutes a taking of private property for which compensation must be made.⁹³ The same rule would apply if they were destroyed by any other than a proper highway use of the street. The cases are not in accord as to what are proper highway uses. For example, the cases are in conflict as to whether the construction of an ordinary commercial railroad on the surface of a street is a proper highway use of the street.⁹⁴ The right of abutting owners is denied where it is held to be such, and generally sustained where not held such. The question of the destruction or impairment of the right of access often arises when the street in front of property is vacated or permanently obstructed, or when such vacation or obstruction occurs elsewhere but has the effect of destroying access to the public street system. The complete destruction of that private right by either of these methods is generally deemed a taking of private property for which compensation must be made.⁹⁵ An interference with this right in

⁹¹ *Adams v. Chicago, B. & N. R. Co.*, 39 Minn. 286, 39 N.W. 629, 1 L. R.A. 493, 12 Am.St.Rep., 644; *Kane v. New York El. R. Co.*, 125 N.Y. 164, 26 N.E. 278, 11 L.R.A. 640.

⁹² *Brakken v. Minneapolis & St. L. Ry. Co.*, 29 Minn. 41, 11 N.W. 124.

⁹³ *Lahr v. Metropolitan E. Ry. Co.*, 104 N.Y. 268, 10 N.E. 528.

⁹⁴ Holding it to be not a valid highway use: *Adams v. Chicago, B. & N. R. Co.*, 39 Minn. 286, 39 N.W. 629, 1 L.R.A. 493, 12 Am.St.Rep. 644.

Holding it to be a proper use: *Montgomery v. Santa Ana Westminster Ry. Co.*, 104 Cal. 186, 37 P. 786, 25 L.R.A. 654, 43 Am.St.Rep. 89. The same differences of view occur with respect to construction of subways for commercial purposes: *City of New York v. Mynderse* (In re Board of Rapid Transit R. Com'rs of City of New York), 197 N.Y. 81, 90 N.E. 456 (not a proper use); *Sears v. Crocker*, 184 Mass. 586, 69 N.E. 327, 100 Am.St.Rep. 577 (a proper use).

⁹⁵ *Borghart v. Cedar Rapids*, 126

one direction only, but leaving a less convenient egress in another direction, is held not a taking within the meaning of the due process clause of the Fourteenth Amendment,⁹⁶ but state decisions thereon are in conflict.

The approach by which acts of the public are held to involve no taking of private property for public use because those acts are a mere exercise of a superior public right is in substance a special case of that last considered. It amounts to defining private rights by reference to the public rights that qualify their scope. Its use in connection with the public regulation and promotion of navigation on navigable waters has already been referred to. A further example thereof is found in the decisions permitting the uncompensated destruction of privately owned obstructions to navigation even where these were originally lawfully constructed with the express or implied consent of the public.⁹⁷ This public right, however, does not extend over that part of a riparian owner's lands that are no part of the bed of the stream in its natural condition. The permanent destruction of his right to use that part of his land must, accordingly, be paid for even when it results from an exercise of the public's right to improve the navigability of the stream.⁹⁸ The same general principle applies to public streets and highways. The abutting owner's easements of light, air and access are qualified by the superior public right to make street improvements or to place structures on the street for the purposes of adapting it to, or improving it for, public travel. A viaduct may be constructed upon a street to carry it over a natural or artificial obstacle to travel thereon without compensating abutting owners for injury to their private easements in the street.⁹⁹ It is also the general rule that damages to abutting property from changes of grade in a street are due to an exercise of the public right to adapt it to travel, and need be paid for only if, and to

Iowa 313, 101 N.W. 1120, 68 L.R.A. 306; *MacGinnitie v. Silvers*, 167 Ind. 321, 78 N.E. 1013.

⁹⁶ *Meyer v. City of Richmond*, 172 U.S. 82, 19 S.Ct. 106, 43 L.Ed. 374.

⁹⁷ *Greenleaf-Johnson Lumber Co. v. Garrison*, 237 U.S. 251, 35 S.Ct. 551, 59 L.Ed. 939; *Chicago, B. & Q. R. Co. v. People of State of Illinois*, 200 U.S. 561, 26 S.Ct. 341, 50 L.Ed. 596, 4 Ann.Cas. 1175.

⁹⁸ *United States v. Cress*, 243 U.S. 316, 37 S.Ct. 380, 61 L.Ed. 746; *United States v. Lynah*, 188 U.S. 445, 23 S.Ct. 349, 47 L.Ed. 539; *Pumpelly v. Green Bay & M. Canal Co.*, 13 Wall. 166, 20 L.Ed. 557.

⁹⁹ *SAUER v. PEOPLE OF STATE OF NEW YORK*, 206 U.S. 536, 27 S.Ct. 686, 51 L.Ed. 1176, *Black's Cas. Constitutional Law*, 2d, 611; *Willis v. Winona City*, 59 Minn. 27, 60 N.W. 814, 26 L.R.A. 142.

the extent that, there is an actual physical injury to the abutting property itself.¹ A duty to compensate for the destruction or impairment of the abutting property's easements arises where the injury or damage results from permitting the permanent appropriation of the streets for non-highway purposes. This is the basis of the decisions requiring compensation for damages resulting from permitting elevated railways to be constructed on a street.² The importance of defining what constitute proper highway uses of public streets is apparent. This is a matter which each state is permitted to determine for itself.

The right of a property owner whose property has been injured by acts of the public, or under its authority, is sometimes denied on the theory that the injury, though real, does not involve a taking of the property. There is a taking requiring compensation whenever the acts in question involve a permanent physical invasion of private property as happens when lands are permanently flooded as the result of structures built in rivers for the purpose of improving their navigability or for any other authorized purpose.³ It is not, however, essential that the flooding be permanent; it is sufficient if there results a permanent liability to intermittent but inevitably recurring overflows.⁴ The latter is as much a taking as the former, although it may affect the amount of compensation required to be paid insofar as it affects the extent of the interest taken.⁵ If the acts of the public amount to claiming a servitude over another's property, there has been a taking to that extent.⁶ The question has sometimes arisen as to how far the legislature can authorize that which would be an actionable private nuisance but for its authorization. It has been held that it can do so if the law authorizing the action is a valid exercise of the state's police power,⁷ and also that it may also authorize small nuisances without

¹ *City of Valparaiso v. Spaeth*, 166 Ind. 14, 76 N.E. 514, 8 Ann.Cas. 1021; *Rakowsky v. City of Duluth*, 44 Minn. 188, 46 N.W. 338; *Nevins v. City of Peoria*, 41 Ill. 502; *Stearns v. Richmond*, 88 Va. 992, 14 S.E. 847; *Talcott Bros. v. City of Des Moines*, 134 Iowa 113, 109 N.W. 311, 12 L.R. A., N.S. 696, 120 Am.St.Rep. 419.

² *Lahr v. Metropolitan E. Ry. Co.*, 104 N.Y. 268, 10 N.E. 523.

³ *United States v. Lynah*, 188 U.S. 445, 23 S.Ct. 349, 47 S.Ct. 539.

⁴ *United States v. Cress*, 243 U.S. 316, 37 S.Ct. 380, 61 L.Ed. 746.

⁵ *United States v. Cress*, 243 U.S. 316, 37 S.Ct. 380, 61 L.Ed. 746.

⁶ *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 43 S.Ct. 135, 67 L.Ed. 287.

⁷ *Sawyer v. Davis*, 136 Mass. 239, 49 Am.Rep. 27.

compensation, but not large ones.⁸ It may not, however, authorize the uncompensated imposition of so direct and substantial a burden upon another's property as would practically deprive the owner of its use and enjoyment. It has thus been held that the owner of property over which the gases and smoke produced by the operation of trains in a tunnel were forced by a fanning system therein installed was entitled to compensation for the damage resulting therefrom although no part of the property was otherwise appropriated.⁹ Except in such extreme cases, the injury is deemed consequential, and for that no compensation is required to be made.¹⁰ The problem of whether property has been taken also arises when property already devoted to one public use is appropriated to another and additional public use. It has arisen chiefly in connection with the grant of special rights in public streets in addition to the public right to use them for travel. The general rule is that no additional burden is placed upon the fee, and that no additional compensation is required therefor, if the new use is a proper highway use of the streets.¹¹ The rule is otherwise where the use is not of that character.¹² There are some cases in which the right of the owner of the abutting land to additional compensation for an additional use is denied if the fee of the street is not owned by him.¹³ Another class of cases involving the question whether there has been a taking consists of those in which the public has attempted to force private persons to make expenditures from which the public would largely derive the benefits. This may be done within limits by an exercise of the police power. Furthermore, one who has been permitted to place structures in streets or streams, which the public may order removed in the exercise of its superior right in the streets or streams,

⁸ *Bacon v. City of Boston*, 154 Mass. 100, 28 N.E. 9.

⁹ *Richards v. Washington Terminal Co.*, 233 U.S. 546, 34 S.Ct. 654, 58 L.Ed. 1088, L.R.A.1915A, 887.

¹⁰ *Gibson v. United States*, 166 U.S. 269, 17 S.Ct. 578, 41 L.Ed. 996; *Omnia Commercial Co. v. United States*, 261 U.S. 502, 43 S.Ct. 437, 67 L.Ed. 773; *Northern Transportation Co. v. Chicago*, 99 U.S. 635, 25 L.Ed. 336.

¹¹ *La Crosse City Ry. Co. v. Higbee*, 107 Wis. 389, 83 N.W. 701, 51 L.R.A. 923; *Julia Bldg. Ass'n v. Bell Telephone Co.*, 88 Mo. 258, 57 Am. Rep. 398; *McDevitt v. People's Nat. Gas Co.*, 160 Pa. 367, 28 A. 948.

¹² *Fobes v. Rome, W. & O. R. Co.*, 121 N.Y. 505, 24 N.E. 919, 8 L.R.A. 453.

¹³ *Fobes v. Rome, W. & O. R. Co.*, 121 N.Y. 505, 24 N.E. 919, 8 L.R.A. 453; see also *Spencer v. Point Pleasant & O. R. R.*, 23 W.Va. 406.

may also be forced to bear the cost of their removal.¹⁴ But it is deemed an invalid taking to compel such person to pay any part of the cost of the public project (except through taxation) in connection with which the structures are required to be removed other than the cost of their removal.¹⁵

Damage Clauses

The results of the doctrine that consequential injuries resulting from acts of the public, or under its authority, need not be paid for are frequently unjust. This has been remedied in some states by state constitutional provisions entitling an owner of property to just compensation in all cases in which his property is "taken or damaged" for the public use. This provision permits recovery in all cases in which private property has sustained substantial injury from the making and use of a public improvement whether the damage be direct or consequential.¹⁶

COMPENSATION

301. The due process clause of the Fourteenth Amendment, and provisions in a state's own constitution, require the payment of just compensation for property taken for a public use by a state or by its authority. The Fifth Amendment expressly requires such payment when property is taken by or under the authority of the United States for a federal public use.
302. The measure of just compensation is the fair value of the property taken as of the time of its taking. The compensation must be paid in money unless the owner of the property is willing to accept payment in some other form.
303. The just compensation need not be paid before or concurrently with the taking of the property, but the law at that time must make adequate provision for its reasonably prompt determination and payment.

Measure of Just Compensation

The Fifth Amendment to the federal Constitution expressly requires that just compensation be made for private property

¹⁴ Chicago, B. & Q. R. Co. v. People of State of Illinois, 200 U.S. 561, 26 S.Ct. 341, 50 L.Ed. 596, 4 Ann.Cas. 1175.

¹⁵ Chicago, B. & Q. R. Co. v. People of State of Illinois, 200 U.S. 561, 26 S.Ct. 341, 50 L.Ed. 596, 4 Ann.

Cas. 1175; Panhandle Eastern Pipe Line Co. v. State Highway Commission, 294 U.S. 613, 55 S.Ct. 563, 79 L.Ed. 1090.

¹⁶ See RIGNEY v. CITY OF CHICAGO, 102 Ill. 64, Black's Cas. Constitutional Law, 2d, 619.

taken for a federal public use. The due process clause of the Fourteenth Amendment has been construed to require the payment of just compensation when private property is taken for public use under the authority of a state.¹⁷ The constitutions of nearly all of the states impose a similar requirement. The principal problem has been to define the constitutionally required measure of such compensation. The character of this problem depends somewhat upon whether the taking of the property consists of its actual appropriation or of the infliction of such direct and substantial injuries as to amount to a taking in the constitutional sense. If the property is actually appropriated the just compensation may not be less than its fair market value at the time of its appropriation.¹⁸ If the taking precedes the payment of compensation the owner is entitled to such addition to the value of the property at the time of its taking as will produce the full equivalent of such value paid as of the time of the taking, and interest at a proper rate is generally recognized as a proper measure of this addition.¹⁹ It is beyond the purview of this text to discuss in detail the numerous matters involved in determining the fair value of the property taken. The Constitution does not require payment of purely speculative values, nor values based on the adaptability of the property for the uses for which it is being taken unless these are reflected in the market price that would be offered in a private sale. It is necessary to consider only those factors affecting value which are reflected in the market value of the property at the time when it is taken.²⁰ In estimating such value consideration may not be given to the fact that the property could be acquired by eminent domain.²¹ If the property taken consists of land, the value of growing crops thereon must be taken into account in estimating its value.²² The fact that the property consists of timber or mineral lands must be considered so far as their presence has affected the market value, but the timber and min-

¹⁷ *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979.

¹⁸ *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 13 S.Ct. 622, 37 L.Ed. 463; *Brooks-Scanlon Corporation v. United States*, 265 U.S. 106, 44 S.Ct. 471, 68 L.Ed. 934.

¹⁹ *United States v. Brown*, 263 U.S. 78, 44 S.Ct. 92, 68 L.Ed. 171.

²⁰ *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 33 S.Ct. 667, 57 L.Ed. 1063; *City of New York v. Sage*, 239 U.S. 57, 36 S.Ct. 25, 46 L.Ed. 143.

²¹ *McGovern v. City of New York*, 229 U.S. 363, 33 S.Ct. 876, 57 L.Ed. 1228, 46 L.R.A., N.S., 391.

²² *Bracken v. City of Albia*, 194 Iowa 596, 139 N.W. 972.

erals need not be separately valued.²³ It is the general rule that injury to a business carried on upon lands taken for public use does not constitute an element in just compensation.²⁴ The foregoing general principles define the minimum constitutional requirements, but there is nothing in either the federal or state constitutions prohibiting compensation in excess thereof.²⁵

The application of these principles has produced certain fairly definite rules in particular classes of cases. It is a practically universal rule that when part of a given tract of land is taken just compensation includes not only the value of the part taken but also damages to the remainder.²⁶ It does not, however, include damages thereto resulting from the use of the adjoining lands of others taken for the same undertaking as that for which his were acquired.²⁷ It frequently happens that the appropriation of a part results in benefits to the remainder because of the uses made of the part that is taken. The question whether, and to what extent, these benefits may be considered in determining just compensation has been much considered. Their consideration can only reduce what would otherwise constitute just compensation. A rule that made no adjustment for them would raise no constitutional issue. This could arise only so far as benefits were permitted to some extent to offset what would otherwise be just compensation. There exists a great diversity of opinion on this point. It is held in some states that special benefits to the retained property may be set off against damages to the latter, but not against the value of the land actually taken; in others that both special and general benefits may be set off to that extent; in others that special benefits may be set off against both damages to the part retained and the value of that taken; and in others that both special and gen-

²³ *Forest Preserve Dist. of Cook County v. Caraher*, 299 Ill. 11, 132 N.E. 211.

²⁴ *Cox v. Philadelphia, H. & P. R. Co.*, 215 Pa. 506, 64 A. 729, 114 Am. St.Rep. 979; *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 43 S.Ct. 684, 67 L.Ed. 1167; *Mitchell v. United States*, 267 U.S. 341, 45 S.Ct. 293, 69 L.Ed. 644. For elements to be considered in valuing a contract taken by the United States, see *Brooks-Scanlon Corporation v. United States*,

265 U.S. 106, 44 S.Ct. 471, 68 L.Ed. 934.

²⁵ *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 43 S.Ct. 684, 67 L.Ed. 1167.

²⁶ *Bangor & P. R. Co. v. McComb*, 60 Me. 290; *South Buffalo R. Co. v. Kirkover*, 176 N.Y. 301, 68 N.E. 366; *Bauman v. Ross*, 167 U.S. 548, 17 S.Ct. 966, 42 L.Ed. 270.

²⁷ *Campbell v. United States*, 266 U.S. 368, 45 S.Ct. 115, 69 L.Ed. 328.

eral benefits may be set off to that extent.²⁸ The constitutions in a few states provide that benefits accruing to an owner's remaining land may not be set off against the damages or compensation to be awarded him. It has been stated that the federal Constitution contains no provision against considering benefits in estimating the just compensation required by the Fifth Amendment.²⁹ The statute involved in that case permitted special benefits to be set off against not only the damages to the part not taken but also against the value of that taken. It is certain that the due process clause of the Fourteenth Amendment would receive the same construction.

Just Compensation a Judicial Question

The question of what constitutes just compensation is one of construing either a state or the federal constitution and is thus a judicial question.³⁰ An owner's constitutional rights are not, however, violated merely because he has been awarded less than he ought to have received.³¹ It no more guarantees him against mistakes in this field than in that of taxation.³² It is only where the mistake is so gross as to pass into arbitrary action that his right to just compensation is impaired.³³ It is also infringed if the rules applied in determining just compensation disregarded the owner's rights so greatly as to produce a clearly arbitrary result.³⁴ The courts have in general tended to support awards arrived at by a fair proceeding in which the owner was accorded a fair opportunity to present his case. The estimate of just compensation where the federal government condemns property is not required to be made by a jury.³⁵ The

²⁸ See the discussion of the various positions on this issue found in *Re City of New York* (In re Water Front in City of New York), 190 N.Y. 350, 83 N.E. 299, 16 L.R.A., N.S., 335, and cases therein cited. See also *Bohm v. Metropolitan El. Ry. Co.*, 129 N.Y. 576, 29 N.E. 802, 14 L.R.A. 344.

²⁹ *Bauman v. Ross*, 167 U.S. 548, 17 S.Ct. 966, 42 L.Ed. 270.

³⁰ *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979.

³¹ *Roberts v. City of New York*,

295 U.S. 264, 55 S.Ct. 689, 79 L.Ed. 1429.

³² *Crane v. Hahlo*, 258 U.S. 142, 42 S.Ct. 214, 66 L.Ed. 514.

³³ *Roberts v. City of New York*, 295 U.S. 264, 55 S.Ct. 689, 79 L.Ed. 1429.

³⁴ *McGovern v. City of New York*, 229 U.S. 363, 33 S.Ct. 876, 57 L.Ed. 1228, 46 L.R.A., N.S., 391.

³⁵ *Bauman v. Ross*, 167 U.S. 548, 17 S.Ct. 966, 42 L.Ed. 270.

same is true with respect to its ascertainment in connection with state condemnation proceedings.³⁶

When Compensation is Payable

The due process clause of the Fourteenth Amendment does not require that the taking of property for a public use shall be either preceded or accompanied by payment of the just compensation to which the owner is entitled.³⁷ Nor need that compensation be even determined prior to, or at, the time when the public enters into possession of the property taken by it.³⁸ It requires only that the law in existence at the time when the property is taken make adequate provision for ascertainment and payment of fair compensation within a reasonable time after the taking.³⁹ A statute that provides for enforcing the duty to ascertain and pay just compensation by judicial proceedings satisfies the demands of the Constitution,⁴⁰ as does one that pledges the public faith and credit to a reasonably prompt determination and payment of such compensation and makes adequate provision for enforcing that pledge.⁴¹ The same principles are generally employed to determine whether state constitutional provisions applying to this matter have been satisfied.⁴² There are, however, some cases in which these latter are construed to require prepayment where the property is taken by a private corporation.⁴³ The constitutions of some of the states contain provisions requiring prepayment in all cases. The requirements of the Fifth Amendment are the same as those of the due process clause of the Fourteenth Amendment ex-

³⁶ *Butler v. City of Worcester*, 112 Mass. 541; *Long Island Water-Supply Co. v. City of Brooklyn*, 166 U. S. 685, 17 S.Ct. 718, 41 L.Ed. 1165.

³⁷ *SWEET v. RECHEL*, 159 U.S. 380, 16 S.Ct. 43, 40 L.Ed. 188, *Black's Cas. Constitutional Law*, 2d, 622; *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 43 S.Ct. 684, 67 L.Ed. 1167.

³⁸ *Backus v. Fort St. Union Depot Co.*, 169 U.S. 557, 18 S.Ct. 445, 42 L.Ed. 853.

³⁹ *SWEET v. RECHEL*, 159 U.S. 380, 16 S.Ct. 43, 40 L.Ed. 188, *Black's Cas. Constitutional Law*, 2d, 622;

People v. Adirondack Ry. Co., 160 N. Y. 225, 54 N.E. 689.

⁴⁰ *SWEET v. RECHEL*, 159 U.S. 380, 16 S.Ct. 43, 40 L.Ed. 188, *Black's Cas. Constitutional Law*, 2d, 622.

⁴¹ *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 43 S.Ct. 684, 67 L.Ed. 1167.

⁴² *McGibson v. County Court of Roane County*, 95 W.Va. 338, 121 S. E. 99; *Haverhill Bridge Proprietors v. County Com'rs of Essex*, 103 Mass. 120, 4 Am.Rep. 518.

⁴³ *Powers v. Bears*, 12 Wis. 213, 78 Am.Dec. 733.

cept that they apply to appropriations of private property by or under authority of the United States.

PROCEDURE

304. Due process requires that the person whose property is taken shall, at some stage before the judgment and award become final, have an opportunity to be heard on the issues of public use and just compensation.

The procedural problems connected with exercises of the power of eminent domain are principally concerned with the notice and hearing required to be accorded the person whose property is taken. The proceedings by which property is taken need not be judicial, but there are certain matters on which the owner is entitled to an ultimate judicial determination. These include the questions whether the use for which the property is being taken is public and whether the compensation paid constitutes the constitutionally required just compensation.⁴⁴ There are also certain matters on which the owner is entitled to notice and an opportunity to be heard regardless of the procedure adopted. These also include the issues of public use and just compensation. This procedural requirement of due process is satisfied if the opportunity to be heard thereon is accorded the owner at some stage before the judgment and award become final. It is not necessary that he have the opportunity at any particular stage in the proceedings.⁴⁵ Since the questions of the necessity of the taking of property for public use, and of the extent of the interest to be taken, are legislative and not judicial, an owner of property is not entitled to any hearing thereon.⁴⁶

⁴⁴ See as to what constitutes adequate judicial review on the issue of just compensation, *Crane v. Hablo*, 258 U.S. 142, 42 S.Ct. 214, 66 L.Ed. 514.

⁴⁵ *Bragg v. Weaver*, 251 U.S. 57, 40 S.Ct. 62, 64 L.Ed. 135.

⁴⁶ *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 43 S.Ct. 684, 67 L.Ed. 1167.

CHAPTER 19

PROTECTION OF CIVIL AND POLITICAL RIGHTS

- 305. Constitutional Basis of such Rights.
- 306. Religious Liberty.
- 307. Personal Liberty.
- 308. Involuntary Servitude.
- 309. Searches and Seizures.
- 310. Quartering of Soldiers.
- 311-312. Political Rights.
- 313. Freedom of Speech and Press.

CONSTITUTIONAL BASIS OF SUCH RIGHTS

- 305. The federal Constitution imposes limitations upon the exercise of governmental power by the federal government and by the states in their respective regulation of the conduct of individuals. The effect of these limitations is to establish areas of immunity of individual conduct from governmental regulation and interference. They protect individual freedom from arbitrary regulation only. The constitutions of the several states impose similar limitations in favor of individual freedom upon their respective governments.

A characteristic feature of the several constitutions of our constitutional system is a bill of rights. It is quite evident from the provisions contained in those bills of rights that their principal aim is the protection of certain individual interests against governmental action. They limit government not only in respect of the procedures which it may employ in enforcing its policies but also in respect of the substantive policies which it may seek to effectuate. The federal bill of rights, consisting of the first eight Amendments to the federal Constitution, is a limitation upon the federal government only. The bill of rights of each state's constitution limits that state's government only. The several bills of rights of the state and federal constitutions are not, however, the only constitutional provisions aimed at protecting individual interests. The federal Constitution contains numerous provisions that have been construed to limit state governments in some of the ways in which the federal bill of rights limits the federal government. The scope of some of the constitutional limitations upon the state and federal governments

in dealing with individual economic interests has already been considered in the chapters discussing the powers of regulation, taxation, and eminent domain. The present chapter will consider the protection accorded by various constitutional limitations to individual interests whose principal importance consists in something other than their economic value. It will consider those limitations only insofar as they limit the substantive policies which the state and federal governments may seek to enforce. The limitations upon governmental procedures in enforcing its policies will be discussed in subsequent chapters. The bulk of the discussion will be concerned with the limitations upon both the federal government and the states insofar as these are found in the federal Constitution.

The necessary effect of limiting the power of government to regulate and control the conduct of individuals is to create an area within which individual interests are immune from governmental regulation and control. The legal problem of defining the extent of that immunity is in form that of construing the constitutional provisions conferring it. It thus depends in the first instance upon the language of those provisions. The process of determining what that language denotes is not, however, a purely linguistic one. It is quite impossible to deduce from the language of the due process clause the numerous specific limitations that have in fact been based thereon, and what is true of that clause is true in varying degrees of the other constitutional limitations. The judicial construction of some of them has been materially affected by historical considerations, while the principal factors affecting the judicial construction of others have been broad general social and political theories. The philosophical theory of "natural rights" has been one of the most important of these. Its emphasis upon the importance of the individual facilitated its use as a measure of the scope of constitutional guarantees intended to protect the individual against arbitrary governmental actions. The assumption that the scope of those guarantees could validly be determined by deduction from a system of "natural rights" was never completely accepted by the courts, for they have invariably recognized the power of government to interpose to prevent evils that arose from an uncontrolled exercise of those "natural rights." The process has thus been one permitting an ultimate adjustment of the scope of those guarantees to changes of emphasis upon the importance of individualism as a social value. It has, however, never gone to the extent of a complete denial of individual freedom as a social value pro-

tected by our constitutions. The immunities or rights with which constitutional law is concerned are not "natural rights" but legal immunities and rights, however much a theory of "natural rights" may have helped to define the specific content of the latter. A legal immunity or right cannot be deduced from any system of "natural rights" without making an assumption that the content of these constitutional guaranties must be defined by reference to that system. The decisions show that this cannot be taken as a universal assumption. This logical inadequacy of the "natural rights" theories does not mean that they have been unimportant factors nor that they have performed no useful service. It means, however, that the ultimate compromises and adjustments between governmental power and immunity from its exertions, which constitute the essence of the problem of defining the scope of our constitutional guaranties, can be more reasonably determined by an approach which treats "natural rights" theories as indicating but one set of considerations that bear on the problem. This affords a basis for giving proper consideration to other factors as well. There is, however, no general approach for defining the scope of all the various constitutional guaranties. The element of individual freedom protected varies with the different guaranties. The determination of the scope of each of them thus constitutes a problem of its own.

RELIGIOUS LIBERTY

306. Both the federal Constitution and the constitutions of the several states contain provisions prohibiting laws for the establishment of religion and securing freedom of conscience and religious liberty. The due process clause of the Fourteenth Amendment to the federal Constitution also protects religious liberty against invasion by the states. The religious liberty guaranteed by those provisions is qualified by the power of Congress, or of the states, to legislate for the protection or promotion of the general health, safety, morals and welfare.

The First Amendment to the federal Constitution prohibits Congress from making any law "respecting an establishment of religion, or prohibiting the free exercise thereof." This provision is a limit on congressional action only, and the states are not prohibited by it from establishing state churches or prohibiting the free exercise of any or all religions. This part of the First Amendment has received very little judicial construction. It would clearly prohibit the establishment of a national church

whether or not supported at public expense, and the enactment of laws requiring church attendance or the support of any church or religious society by private persons or from the public revenues. It has been stated that the purpose of this provision was "to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect."¹ The principal controversies that have come before the courts have concerned the extent to which Congress may prohibit overt acts constituting a part of religious worship or done in fulfillment of obligations imposed by the tenets of a religion. It has been definitely determined that this provision does not prohibit legislation punishing acts "inimical to the peace, good order and morals of society."² It was on that basis that the congressional prohibition of polygamous marriages within a territory was held not to violate this provision even as applied to such marriages entered into in accordance with the tenets of a religious sect.³ The scope of religious liberty is thus limited by the principle that the practice of religion may be made to conform to generally prevailing conceptions of the general safety, morals and welfare, even though those conceptions may have been determined in part by the tenets of some other religion. The Amendment does not prevent Congress from adjusting its legislative policies to existing religious differences in the same manner as it might adapt it to other differences. It has, accordingly, been held that this provision is not violated by exempting from combatant military service the members of religious sects whose tenets excluded the moral right to engage in war.⁴ The few decisions construing this provision leave undetermined many questions that might be raised, but they indicate the general point of view from which their solutions would be worked out.

¹ *Davis v. Beason*, 133 U.S. 333, 10 S.Ct. 299, 33 L.Ed. 637. See also *Reynolds v. United States*, 98 U.S. 145, 25 L.Ed. 244.

² *Davis v. Beason*, 133 U.S. 333, 10 S.Ct. 299, 33 L.Ed. 637.

³ *Reynolds v. United States*, 98 U.

S. 145, 25 L.Ed. 244; *Davis v. Beason*, 133 U.S. 333, 10 S.Ct. 299, 33 L.Ed. 637.

⁴ SELECTIVE DRAFT LAW CASES, 245 U.S. 366, 38 S.Ct. 159, 62 L.Ed. 349, L.R.A.1918C, 361, Ann.Cas. 1918B, 856, Black's Cas. Constitutional Law, 2d, 333.

It has already been stated that the foregoing provisions of the First Amendment do not limit the several states. It is not, however, to be inferred therefrom that the federal Constitution leaves the states completely free to restrict or interfere with religious liberty in ways that would violate the First Amendment if the restrictions were imposed by Congress. It has never been decided that any provision of the federal Constitution limits the powers of the states in that manner, but it has at least been stated that the provision of the Fourteenth Amendment which prohibits a state from depriving any person of liberty without due process of law protects against invasion by the state of the religious liberty protected by the First Amendment against invasion by Congress.⁵ It was not stated that the character and extent of the protection were the same in both cases, but it is highly probable that the due process clause of the Fourteenth Amendment would be held to prohibit, or to permit, the type of legislation heretofore held to violate, or not to violate, the First Amendment. The maintenance by the states of the policies of religious freedom and the separation of church and state is, however, adequately provided for by provisions contained in the constitutions of the several states. These are frequently more restrictive than are the provisions of the First Amendment. The courts have, in interpreting their scope, taken the same position as has the federal Supreme Court in construing the First Amendment, that religious freedom is qualified by the states' power of enacting reasonable legislation to promote the general health, safety, morals and welfare. It is on that basis that statutes making it a punishable offense to practice medicine without a license have been sustained as applied to those relying upon prayer to heal disease,⁶ as well as statutes punishing the failure to provide proper medical attendance for a sick child as applied to parents whose religious beliefs were opposed to the medical treatment of disease.⁷ Similarly laws requiring the observance of Sunday by prohibiting certain forms of work and the conduct of certain forms of amusement enterprises on that day are universally held not to violate state constitutional guaranties of religious lib-

⁵ *Hamilton v. Regents of the University of California*, 293 U.S. 245, 55 S.Ct. 197, 79 L.Ed. 343. See both the opinion of Mr. Justice Butler and the separate concurring opinion of Mr. Justice Cardozo.

⁶ *State v. Marble*, 72 Ohio St. 21,

73 N.E. 1063, 70 L.R.A. 835, 106 Am. St.Rep. 570, 2 Ann.Cas. 898; *Smith v. People*, 51 Colo. 270, 117 P. 612, 36 L.R.A.,N.S., 158.

⁷ *People v. Pierson*, 176 N.Y. 201, 68 N.E. 243, 63 L.R.A. 187, 98 Am.St. Rep. 663.

erty.⁸ State constitutions frequently expressly prohibit the use of public funds in aid of any church, sect, or sectarian institution. Provisions of that character do not prevent exempting property used for religious purposes from taxation if no unreasonable discriminations are made in carrying out that policy. It is apparent from the foregoing that the constitutional guaranties protect freedom of religious belief more extensively than they do freedom of action conformably to those beliefs.

PERSONAL LIBERTY

307. The term "liberty" as used in the due process clause of the Fourteenth Amendment has been construed to include the right of an individual to be immune from unreasonable interference with his physical person, his privilege of associating with others to promote common objectives, and freedom of learning and teaching. A state may, however, subject the exercise of these powers and privileges to reasonable regulation. The due process clause of the Fifth Amendment undoubtedly protects the individual against unreasonable interference with them by the federal government.

General Considerations

The term "personal liberty" could be so broadly defined as to denote all of the specific immunities of individuals from governmental regulation regardless of their constitutional basis. The present section will deal with some only of the particular elements in the bundle of immunities composing personal liberty. It will consider principally the limitations imposed by the several provisions of section 1 of the Fourteenth Amendment upon state interference with individual freedom by legislation the primary objective of which was something other than the regulation of the community's economic interests and activities. The provision most frequently invoked is that which prohibits a state from depriving any person of liberty without due process of law. It prohibits a state from unreasonably interfering with individual freedom, but permits it to so regulate it that its exercise shall be compatible with the public welfare. The courts have never undertaken an exhaustive enumeration of the various elements

⁸ *Hiller v. State*, 124 Md. 385, 92 A. 842; *State v. Morris*, 28 Idaho 599, 155 P. 296, L.R.A.1916D, 573.

includible within the liberty thus guaranteed against unreasonable impairment. It has been stated to include freedom from bodily restraint, freedom of contract and of following the common occupations of life, the right to acquire useful knowledge, to marry and establish a home and bring up children, to worship God according to the dictates of one's own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.⁹ It is to be noted that an expansion of the meaning of the term "liberty" has been the means for protecting against invasion by the states many of the rights protected against invasion by the federal government by the provisions of the federal Bill of Rights. An earlier attempt to accomplish that result by an interpretation of the privileges and immunities clause of the Fourteenth Amendment had been rejected.¹⁰ The problem of how far any of the elements of liberty are protected by the due process clause is not solved by even the most exhaustive enumeration of those elements. The crucial problem is usually whether the particular restriction upon personal liberty is reasonable. The answer to that question invariably depends upon the degree of the restriction and whether it is a reasonable means for the protection or promotion of the general health, safety, morals, or welfare. A state is also prohibited by the equal protection clause of the Fourteenth Amendment from making unreasonable classifications in connection with legislative restrictions upon personal liberty.

Compulsory Vaccination and Sterilization Laws

A state may limit personal freedom in any reasonable manner for the protection or promotion of the public health. It may, accordingly, enforce compulsory vaccination against smallpox whenever necessary to protect the public health, even though this involves submitting one's body to another's control.¹¹ The fact that there exist marked differences of opinion as to the efficacy of vaccination does not deprive it of that power. The equal

⁹ MEYER v. STATE OF NEBRASKA, 262 U.S. 390, 43 S.Ct. 625, 67 L. Ed. 1042, 29 A.L.R. 1446, Black's Cas. Constitutional Law, 2d, 626.

¹⁰ See Slaughter House Cases, 16 Wall. 36, 21 L.Ed. 394; Walker v. Sauvinet, 92 U.S. 90, 23 L.Ed. 678; Presser v. State of Illinois, 116 U.S.

252, 6 S.Ct. 580, 29 L.Ed. 615; Maxwell v. Dow, 176 U.S. 581, 20 S.Ct. 448, 44 L.Ed. 597; Twining v. State of New Jersey, 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97.

¹¹ Jacobson v. Massachusetts, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643, 3 Ann.Cas. 765.

protection required by the Constitution is not denied by excepting from the provisions of such a law those presenting medical certificates that they are unfit subjects for vaccination.¹² It violates neither the due process nor equal protection clauses to exclude from the public or private schools children who have not been vaccinated.¹³ The same principles would apply in determining the validity of other restrictions upon personal freedom deemed reasonably necessary to promote any objective within the range of a state's police power. The analogy of compulsory vaccination laws has been invoked to sustain the more extreme interference with personal freedom made by a statute providing for the compulsory sterilization of mental defectives, who were inmates of state institutions, upon a finding by designated public officials that it would be for the best interests of society and the patient.¹⁴ It was also held that the equal protection clause was not violated by limiting the application of the statute to imbeciles who were confined in specified state institutions. It has, however, been held an invalid classification to limit such a statute to imbeciles whose children were likely to become public charges and thus to exclude from its operation those imbeciles capable of supporting their children.¹⁵ The reasoning by which legislation for the compulsory sterilization of mental defectives has been sustained would warrant its application to such defectives outside of as well as those within state institutions. It is necessary in legislation of this character to make adequate procedural provisions for the protection of those to whom it is proposed to apply the statute.¹⁶ It should also be noted that the arbitrary or unequal enforcement of measures of the kind considered in this paragraph would itself violate due process or equal protection clauses even though the statute itself were valid.¹⁷ State constitutional provisions, such as those prohibiting the infliction of cruel and unusual punishment, are sometimes held to invalidate

¹² *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643, 3 Ann.Cas. 765.

¹³ *Zucht v. King*, 260 U.S. 174, 43 S.Ct. 24, 67 L.Ed. 194; *Viemeister v. White*, 179 N.Y. 235, 72 N.E. 97, 70 L.R.A. 796, 103 Am.St.Rep. 859, 1 Ann.Cas. 334.

¹⁴ *Buck v. Bell*, 274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000.

¹⁵ *Smith v. Wayne Probate Judge*, 231 Mich. 409, 204 N.W. 140, 40 A.L.R. 515. See also *Smith v. Board of Examiners of Feeble-Minded*, 85 N.J.L. 46, 88 A. 963.

¹⁶ *Williams v. Smith*, 190 Ind. 526, 131 N.E. 2; *Davis v. Berry*, D.C., 216 F. 413.

¹⁷ *Zucht v. King*, 260 U.S. 174, 43 S.Ct. 24, 67 L.Ed. 194.

compulsory sterilization laws,¹⁸ but the more recent decisions are to the contrary.¹⁹

Freedom of Teaching and Learning

The right to acquire useful knowledge has been expressly included in the liberty which the due process clause of the Fourteenth Amendment protects against unreasonable impairment by a state.²⁰ There is, however, nothing in the federal Constitution requiring a state to provide a system of public education at any educational level. The constitutions of most of the states, however, make provision therefor, and those of some of them provide for the establishment of a state university. A state has the same power to regulate the right to pursue and acquire useful knowledge that it has to regulate the exercise of any other right. It may require the compulsory attendance of children of proper age at some school,²¹ but no case has been found that has attempted to define the precise limits upon this power. A state may not, however, establish a state monopoly of education by requiring all children to attend public schools and thus prohibiting their parents or guardians from providing for their education by private instruction or in private or parochial schools.²² It was held in the case last cited that such a requirement constituted an unreasonable interference with the liberty of parents and guardians to direct the upbringing and education of children under their control, and that "the fundamental theory upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only." The opinion announces the doctrine that the "child is not the mere creature of the state," but that those who nurture him have the right and duty to prepare him for obligations additional to those due to the state. A state's interest in the proper education of the children within it

¹⁸ Davis v. Berry, D.C., 216 F. 413.

¹⁹ Smith v. Wayne Probate Judge, 231 Mich. 409, 204 N.W. 140, 40 A.L.R. 515; Buck v. Bell, 148 Va. 310, 130 S.E. 516, 51 A.L.R. 855.

²⁰ MEYER v. STATE OF NEBRASKA, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042, 29 A.L.R. 1446, Black's Cas. Constitutional Law, 2d, 626.

²¹ State v. Jackson, 71 N.H. 552, 53 A. 1021, 60 L.R.A. 739; PIERCE v.

SOCIETY OF THE SISTERS OF THE HOLY NAMES OF JESUS AND MARY, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, 39 A.L.R. 468, Black's Cas. Constitutional Law, 2d, 629.

²² PIERCE v. SOCIETY OF THE SISTERS OF THE HOLY NAMES OF JESUS AND MARY, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, 39 A.L.R. 468, Black's Cas. Constitutional Law, 2d, 629.

is such as to justify its regulation of privately operated schools. It may provide for the inspection and examination of their teachers and pupils, require the former to be of good moral character and patriotic disposition and to possess proper educational qualifications, require such schools to teach certain subjects plainly essential to good citizenship, and prohibit the teaching of that which is manifestly inimical to the public welfare.²³ Its exercise of its powers of control must, however, be reasonable. It has been held that a statute forbidding the teaching in any school of any subject in any language except English, and also prohibiting the teaching of any foreign language until the pupil had passed the eighth grade, was an unconstitutional interference with the liberty of teaching and with the rights of parents which could not be justified in time of peace.²⁴ A state's power is not limited to the regulation of private schools covering the same general educational field as the public's own educational system, but extends as well to those offering instruction in other fields of learning or technical or professional training. The power of a state to control private schools is probably greater when these are conducted by corporations organized under its laws than when conducted by individuals.²⁵ It is extensive enough in any case to enable the state to protect the public interest against injury from the private conduct of educational activities.

A state has a proprietary interest in its publicly owned and operated educational institutions. Its power to prescribe curricula is practically unlimited as far as the due process clause is concerned. A statute penalizing a teacher in a public school for teaching the doctrines of man's descent from lower orders of animals has been held not to deny the teacher due process since the state has the power to prescribe conditions with which its employees must comply.²⁶ The principal problems arising in connection with a state's regulation of its educational institutions have concerned its power to condition the right to attend them. The right to attend them is not a privilege or immunity of fed-

²³ See *PIERCE v. SOCIETY OF THE SISTERS OF THE HOLY NAMES OF JESUS AND MARY*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, 39 A.L.R. 468, *Black's Cas. Constitutional Law*, 2d, 629.

²⁴ *MEYER v. STATE OF NEBRASKA*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042, 29 A.L.R. 1446,

Black's Cas. Constitutional Law, 2d, 626.

²⁵ See *Berea College v. Commonwealth of Kentucky*, 211 U.S. 45, 29 S.Ct. 33, 53 L.Ed. 81.

²⁶ *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363, 53 A.L.R. 821.

eral citizenship protected against impairment by the privileges and immunities clause of the Fourteenth Amendment, but is a creature of state law.²⁷ A state is, however, limited in conditioning the grant of this right or privilege by those provisions of the federal Constitution that limit its action in other fields, and of these the most important in this connection are the due process and equal protection clauses of the Fourteenth Amendment. The due process clause permits a state to impose reasonable conditions upon the right to attend any part of its public educational system. It is valid to require applicants to submit to a physical examination,²⁸ or to present a certificate of successful vaccination.²⁹ It has also been held no denial of due process to deny admission to the state university to members of Greek letter fraternities, nor does such a regulation deny equal protection by permitting those who were students when the law was enacted to continue as such despite their membership in such fraternities.³⁰ It is no violation of due process to deny readmission to a student who has been suspended for refusing to comply with a regulation making military drill compulsory.³¹ It has, however, been held a deprivation of liberty without due process to expel children from the public grade schools for their refusal to salute the flag based on religious grounds.³² The court made some point of the fact that state law required the children to attend some grade school, but the relevance of this factor is doubtful. It is clear, however, that conditions may be imposed upon the privilege of continuing in attendance to the same extent that they may be imposed upon the right to be admitted, and that due process permits the enforcement of valid conditions by a denial of admission, by suspension, or by expulsion.

The equal protection clause of the Fourteenth Amendment prohibits a state from making unreasonable discriminations in

²⁷ *Ward v. Flood*, 48 Cal. 36, 17 Am.Rep. 405; *Lehew v. Brummell*, 103 Mo. 546, 15 S.W. 765, 11 L.R.A. 828, 23 Am.St.Rep. 895.

²⁸ *Streich v. Board of Education of Independent School Dist. of City of Aberdeen*, 34 S.D. 169, 147 N.W. 779, L.R.A.1915A, 632, Ann.Cas.1917A, 760.

²⁹ *State v. Martin & Lipe*, 134 Ark. 420, 204 S.W. 622; *Viemeister v. White*, 179 N.Y. 235, 72 N.E. 97, 70

L.R.A. 796, 103 Am.St.Rep. 859, 1 Ann.Cas. 334.

³⁰ *Waugh v. Board of Trustees of University of Mississippi*, 237 U.S. 589, 35 S.Ct. 720, 59 L.Ed. 1131.

³¹ *Hamilton v. Regents of the University of California*, 293 U.S. 245, 55 S.Ct. 197, 79 L.Ed. 343.

³² *Gobitis v. Minersville School Dist.*, D.C., 21 F.Supp. 581.

providing educational facilities for its people. The principal controversies in this connection have concerned discriminations based on racial grounds. The equal protection clause requires that the state shall afford substantially equal opportunities for the education of the members of different races, but does not require that the members of the different races shall be permitted to attend the same schools.³³ Statutes providing for the establishment of separate schools for the different races have been held valid whenever substantially equal opportunities were afforded all the races.³⁴ This principle applies to institutions of higher learning as well as to the common schools.³⁵ The crucial point has thus become whether any given system does afford the requisite equality of treatment. It is not essential that the schools available for one race shall be as conveniently situated with reference to the members of that race as are those available for the members of the other race.³⁶ It is essential that no member of one race shall in fact be deprived of a reasonable opportunity to attend a school of the kind made available by the public to the members of another race.³⁷ It has, however, been held that the equal protection clause is not violated by failing to maintain a high school for colored citizens while continuing to maintain one for white students where the failure was due to insufficient funds.³⁸ The facts that justify an inference of equality of opportunity are not the same in the case of common schools and colleges and universities. It has been held that the requisite equality is denied as between white and colored students wishing to study law by providing a law school only for the former at the state university while providing for the payment of a reasonable tuition for training colored persons in the law school of the state university of any contiguous state which ad-

³³ *Gong Lum v. Rice*, 275 U.S. 78, 48 S.Ct. 91, 72 L.Ed. 172; *Pearson v. Murray*, 169 Md. 478, 182 A. 590, 103 A.L.R. 706.

³⁴ *Roberts v. City of Boston*, 5 Cush., Mass., 198; *McMillan v. School Committee Dist. No. 4*, 107 N.C. 609, 12 S.E. 330, 10 L.R.A. 823; *People ex rel. King v. Gallagher*, 93 N.Y. 438, 45 Am.Rep. 232.

³⁵ *Pearson v. Murray*, 169 Md. 478, 182 A. 590, 103 A.L.R. 706; *State*

ex rel. Gaines v. Canada, Mo.Sup., 113 S.W.2d 783.

³⁶ *Lehew v. Brummell*, 103 Mo. 546, 15 S.W. 765, 11 L.R.A. 828, 23 Am.St.Rep. 895.

³⁷ *Gong Lum v. Rice*, 275 U.S. 78, 48 S.Ct. 91, 72 L.Ed. 172; *Pearson v. Murray*, 169 Md. 478, 182 A. 590, 103 A.L.R. 706.

³⁸ *Cumming v. Board of Education of Richmond County*, 175 U.S. 528, 20 S.Ct. 197, 44 L.Ed. 262.

mitted colored persons to its law school.³⁹ The equal protection clause was, however, held to have been violated where the only provision for negroes wishing to study law was by a wholly inadequate system of scholarships for their training in law schools in other states, and mandamus to compel the university authorities to admit the excluded negroes was held to constitute the only effective remedy for giving them the equality to which they were constitutionally entitled.⁴⁰ The privileges and immunities and the equal protection clauses of the Fourteenth Amendment are no limit upon a private institution's power to exclude members of particular races, even though it is receiving some public financial support under a contract for the training of certain persons designated by the public authorities.⁴¹ The Fourteenth Amendment applies only to state action, and the action of the private institution is not such. It should be noted that a state is not required by the provisions of the interstate privileges and immunities clause⁴² to admit citizens of other states to its publicly maintained educational institutions.

The federal government has no specific power to control education, but possesses an implied power to do so within the District of Columbia and federal territories. The federal Constitution contains no specific limitation upon its powers to exercise whatever control it may have over it, but there is no reason for doubting that the due process clause of the Fifth Amendment limits it in exercising that power in the same general manner in which the due process and equal protection clauses of the Fourteenth Amendment limit a state in regulating liberty of learning and teaching.⁴³

Freedom of Association

The liberty secured by the Fourteenth Amendment includes the right to associate with others for the furtherance of common purposes and enterprises of both an economic and a non-

³⁹ *State of Missouri ex rel. Gaines v. Canada*, 305 U.S. —, 59 S.Ct. 232, 83 L.Ed. —.

⁴⁰ *Pearson v. Murray*, 169 Md. 478, 182 A. 590, 103 A.L.R. 706.

⁴¹ *State ex rel. Clark v. Maryland Institute for the Promotion of Mechanic Arts*, 87 Md. 643, 41 A. 126.

⁴² U.S.C.A.Const. Art. 14, Section 1, Clause 1.

⁴³ It is not yet definitely established that the due process clause of the Fifth Amendment, U.S.C.A.Const., constitutes a general limitation on the power of Congress to classify in enacting legislation, but its general prohibition against arbitrary action is broad enough to include a prohibition against arbitrary classification.

economic character. It is, however, a right which must yield to a rightful exertion of a state's police power. A state may validly regulate associations organized to promote some cause, and require those requiring their members to take a secret oath to file with a public officer a copy of their constitutions and the oaths. It does not deny due process to the members of such an organization to make it a punishable offense knowingly to belong to any such society that has failed to file the required documents.⁴⁴ The equal protection clause does not prevent limiting the scope of such statute to societies of the type from which the evils aimed at were to be feared and exempting therefrom those from whom such evils were not feared.⁴⁵ The principles applied in the case last cited would sustain any other regulation of the freedom of association reasonably necessary to prevent its exercise from endangering the general peace or safety or the peace or safety of any part of the community. This right is not a privilege or immunity of federal citizenship within the meaning of the Fourteenth Amendment, and such protection as it receives under the federal Constitution is in no wise affected by its possessor being a citizen of the United States.⁴⁶ The due process clause of the Fifth Amendment undoubtedly limits the federal government's power to interfere with this right in the same general manner.

Right to Bear Arms

The Second Amendment to the federal Constitution provides that the right of the people to keep and bear arms shall not be infringed. This Amendment is no restriction upon the power of the several states, but protects that right only against infringement by the federal government.⁴⁷ It has been held that the right referred to in that Amendment is not one of the privileges and immunities of federal citizenship protected against abridgment by a state by the provisions of the Fourteenth Amendment.⁴⁸ It has, however, been stated that a state has no

⁴⁴ People of State of New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 49 S.Ct. 61, 73 L.Ed. 184, 62 A.L.R. 785.

⁴⁵ People of State of New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 49 S.Ct. 61, 73 L.Ed. 184, 62 A.L.R. 785.

⁴⁶ People of State of New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 49 S.Ct. 61, 73 L.Ed. 184, 62 A.L.R. 785.

⁴⁷ United States v. Cruikshank, 92 U.S. 542, 23 L.Ed. 588.

⁴⁸ Presser v. State of Illinois, 116 U.S. 252, 6 S.Ct. 580, 29 L.Ed. 615.

power to prohibit its people from keeping and bearing arms so as to deprive the federal government of this resource for maintaining the public security and to disable it from performing its duty to protect the nation, but the basis for this position was not found in the Second Amendment.⁴⁹ Neither that principle nor any provision of the Second or Fourteenth Amendment prevents a state from prohibiting its citizens from associating together to drill or parade with arms.⁵⁰ The constitutions of many of the states, however, guarantee their peoples the right to keep and bear arms. Neither this right,⁵¹ nor any conferred by the federal Constitution, is infringed by statutes prohibiting the carrying of concealed weapons.

INVOLUNTARY SERVITUDE

308. The Thirteenth Amendment to the federal Constitution provides that neither slavery nor involuntary servitude, except as punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction. It also confers upon Congress the power of enforcing this prohibition.

The right protected by this Amendment is that of being immune from enforced labor. It differs from most of the other limitations found in the Constitution in that it is not merely a prohibition of certain forms of governmental action but is an absolute prohibition of slavery and involuntary servitude regardless of how or by whom those conditions are brought about.⁵² It prohibits them when resulting from the acts of private persons as well as when maintained under the authority of state or federal legislation or other governmental action. The power conferred upon Congress to enforce this prohibition may be directly exerted to control the conduct of individuals whether or not acting by authority of a state. It is on this basis that the federal statute prohibiting peonage, or the compulsory serv-

⁴⁹ *Presser v. State of Illinois*, 116 U.S. 252, 6 S.Ct. 580, 29 L.Ed. 615.

Commonwealth v. Murphy, 166 Mass. 171, 44 N.E. 133, 32 L.R.A. 606.

⁵⁰ *Presser v. State of Illinois*, 116 U.S. 252, 6 S.Ct. 580, 29 L.Ed. 615. The same decision has been reached in construing a state constitutional provision protecting the right of the people to keep and bear arms; *Com-*

⁵¹ *Wright v. Commonwealth*, 77 Pa. 470; *State v. Speller*, 86 N.C. 697.

⁵² See statement in *Civil Rights Cases*, 109 U.S. 3, 3 S.Ct. 18, 27 L. Ed. 835. See also *Clyatt v. United States*, 197 U.S. 207, 25 S.Ct. 429, 49 L.Ed. 726.

ice based upon the peon's indebtedness to his master, has been held valid.⁵³ The principal cases that have arisen under this Amendment have, however, involved state legislation enacted to provide an incentive for the performance of contracts for labor and service. A state statute which punished a person for breaching his contract for personal services without repayment of advances made to him by his employer at the time the contract was entered into, unless he had just cause for breaching it, has been held invalid as in effect an indirect attempt to compel one person to work for another in liquidation of a debt owed the latter by the former.⁵⁴ It is not rendered valid merely by treating a contract breached under those circumstances as made with fraudulent intent to injure the employer where the fact of such breach alone would have authorized the conviction of the employee of such crime. It has also been held that a condition of peonage in violation of the Thirteenth Amendment results from a state statute permitting a person fined upon conviction of a misdemeanor to confess judgment with a surety in the amount of the fine and costs, and to agree with the surety who pays said fine and costs to reimburse him by working for him upon terms approved by the court, where the breach of such contract was itself made a misdemeanor punishable in the same manner.⁵⁵ The natural and inevitable effect of this system was held to be to compel the convicted person to continue his services under the contract with the surety, and thus to establish a system of peonage. The Thirteenth Amendment thus places an important limitation upon a state's power to enforce the payment of debts owed by private persons whether to other private persons or the public. It does not, however, prohibit mere imprisonment for debt, and probably not imprisonment for debt at hard labor for the state itself.⁵⁶ During

⁵³ *Clyatt v. United States*, 197 U.S. 207, 25 S.Ct. 429, 49 L.Ed. 726.

⁵⁴ *BAILEY v. STATE OF ALABAMA*, 219 U.S. 219, 31 S.Ct. 145, 55 L.Ed. 191, *Black's Cas. Constitutional Law*, 2d, 631.

⁵⁵ *United States v. Reynolds*, 235 U.S. 133, 35 S.Ct. 86, 59 L.Ed. 162.

⁵⁶ The constitutions of many of the states prohibit the imprisonment of debtors as a coercive measure for enforcing the discharge of civil obli-

gations. An important problem of construing such clauses is as to the debts to which they apply. The following have been held not to constitute debts within the meaning of one or more of such provisions: obligations arising out of torts, *Stidham v. Dubose*, 128 S.C. 318, 121 S.E. 791, 33 L.R.A. 645; *People ex rel. v. Walker*, 286 Ill. 541, 122 N.E. 92; fines and penalties, *Clark v. State*, 171 Ind. 104, 84 N.E. 984, 16 Ann.Cas. 1229; *Peterson v. State*, 79 Neb. 132, 112 N.W. 306, 14 L.R.A., N.S., 292,

the late war several states enacted laws requiring all men between certain ages to be engaged, or to work regularly, in some useful calling or occupation, under penalty of punishment, and this without regard to the individual's ability to support himself and his dependents without labor. These laws were held to violate the Thirteenth Amendment in some cases,⁵⁷ and in others sustained as valid war measures.⁵⁸ Historical considerations have been the basis for holding valid certain exceptional laws which do result in forcing one to work against one's will. It is on that basis that a federal statute has been held not to violate this Amendment although it punished seamen deserting their vessel and provided for the return to their ships of seamen deserting in violation of a contract of employment,⁵⁹ that compulsory military service is held not to constitute involuntary servitude,⁶⁰ and that the compulsory requirement of several days' labor upon the public highways annually is held not to violate the Amendment.⁶¹ The Amendment expressly excepts involuntary servitude imposed as punishment for crime whereof the party shall have been duly convicted. The scope of the exception is necessarily limited insofar as the Amendment itself prevents a state from making a breach of contract a criminal offense. It is not essential that the involuntary servitude imposed as punishment consist of forced labor directly for government itself. The Amendment has been held not to be violated by farming out convict labor to private contractors.⁶² Constitutional provisions prohibiting involuntary servitude are, however, violated by a statute authorizing a "vagrant" to be

126 Am.St.Rep. 651; alimony payments, *Adams v. Adams*, 80 N.J.Eq. 175, 83 A. 190, Ann.Cas.1913E, 1083; *Bowman v. Wayne* Circuit Judge, 214 Mich. 518, 183 N.W. 232. Such provisions do not prohibit legislation making it an offense to give a check on a bank in which the drawer has insufficient funds to meet it, *State v. Avery*, 111 Kan. 588, 207 P. 838, 23 A.L.R. 453; or making it a misdemeanor to procure hotel accommodations with a preconceived intent not to pay therefor, *State v. Sibley*, 152 La. 825, 94 So. 410.

⁵⁷ *Ex parte Hudgins*, 86 W.Va. 526, 103 S.E. 327, 9 A.L.R. 1361.

⁵⁸ *State v. McClure*, 7 Boyce 265, 30 Del., 265, 105 A. 712.

⁵⁹ *Robertson v. Baldwin*, 165 U.S. 275, 17 S.Ct. 326, 41 L.Ed. 715.

⁶⁰ SELECTIVE DRAFT LAW CASES, 245 U.S. 366, 38 S.Ct. 159, 62 L.Ed. 349, L.R.A.1918C, 361, Ann. Cas.1918B, 856, Black's Cas. Constitutional Law, 2d, 333.

⁶¹ *In re Dassler*, 35 Kan. 678, 12 P. 130; *Dennis v. Simon*, 51 Ohio St. 233, 36 N.E. 832; *Butler v. Perry*, 240 U.S. 328, 36 S.Ct. 258, 60 L. Ed. 672.

⁶² *Comer v. Bankhead*, 70 Ala. 493; *Anderson v. Salant*, 38 R.I. 463, 96 A. 425, L.R.A.1916D, 651.

hired out to the highest bidder even though he has not been accused or convicted of any crime.⁶³

SEARCHES AND SEIZURES

309. The Fourth Amendment to the federal Constitution provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The constitutions of the several states contain a similar guaranty.

General Scope of Fourth Amendment

The Fourth Amendment is a part of the federal Bill of Rights and applies to the federal government only. Its purpose was to prevent violations of private security in person and property, and unlawful invasions of the sanctity of the home, by officers of the law acting under legislative or judicial sanction, and to give a remedy against such usurpations when attempted.⁶⁴ It does not prohibit the federal government from taking advantage of unlawful searches made by a private person⁶⁵ or under authority of state law.⁶⁶ The question of when an invalid search and seizure in fact made by state officers can be deemed to have been made by the federal government has been considered in several cases by the federal Supreme Court. It has been held that the mere participation of federal officers in such a search does not in itself render it a federal undertaking, but that it becomes such if the latter participate under color of their federal office so as in effect to make it a joint search.⁶⁷ An unlawful search and seizure made by state officers alone but solely on behalf of the United States is deemed made by the federal government so as to prohibit its use of the seized articles in

⁶³ In re Thompson, 117 Mo. 83, 22 S.W. 863, 20 L.R.A. 462, 38 Am.St. Rep. 639.

⁶⁴ See statement in Adams v. People of State of New York, 192 U.S. 585, 24 S.Ct. 372, 48 L.Ed. 575.

⁶⁵ Burdeau v. McDowell, 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048, 13 A.L.R. 1159.

⁶⁶ Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652, L.R.A.1915B, 834, Ann.Cas.1915C, 1177; Schroeder v. United States, 2 Cir., 7 F.2d 60.

⁶⁷ Byars v. United States, 273 U.S. 28, 47 S.Ct. 248, 71 L.Ed. 520; Kanellos v. United States, 4 Cir., 282 F. 461.

evidence against their owners.⁶⁸ It is immaterial in that situation that the state officers were in no sense federal agents, and also whether or not the state law imposed upon the state officers the duty of aiding in the enforcement of federal law. The act of the federal government in using the materials seized was viewed as a ratification of the act of the state officers who had acted on behalf of the United States. It would seem logical to apply the same rule where the state officers acted on behalf of both the United States and the state, but this appears not to be the rule.⁶⁹ It is clear that the ultimate test of whether an unlawful search and seizure is imputable to the federal government depends upon whether those who made it did so on its behalf, and that that government cannot avoid the prohibitions of the Fourth Amendment by a judicious policy of co-operation with state authorities or even private persons.

Meaning of Unreasonable Searches and Seizures

The immunity accorded by the Fourth Amendment includes not only freedom from unreasonable searches and seizures of one's person and house but also from unreasonable searches and seizures of one's papers and effects. It has been held that the protection extended to one's house does not extend to the open spaces and fields belonging to one⁷⁰ and that telephone wires leading from one's house are no part thereof for purposes of this Amendment.⁷¹ Its protection does, however, extend to sealed letters and packages in the mails, and these may be opened and examined only in response to a valid search warrant.⁷² This provision would probably not apply to a censorship established as a war measure. Letters written by a prisoner may be opened by the warden under the prison's disciplinary rules.⁷³ The Amendment does not guarantee one against all searches and seizures, but only against those that are unreasonable. It applies only where the acts of the government constitute a search or seizure. The historical purpose of the Fourth Amendment

⁶⁸ *Gambino v. United States*, 275 U.S. 310, 48 S.Ct. 137, 72 L.Ed. 293, 52 A.L.R. 1381.

⁶⁹ See *Schroeder v. United States*, 2 Cir., 7 F.2d 60, as interpreted and distinguished in *Gambino v. United States*, supra, footnote 68.

⁷⁰ *Hester v. United States*, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898.

⁷¹ *OLMSTEAD v. UNITED STATES*, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944, 66 A.L.R. 376, *Black's Cas. Constitutional Law*, 2d, 634.

⁷² *Ex parte Jackson*, 96 U.S. 727, 24 L.Ed. 877.

⁷³ *Stroud v. United States*, 251 U.S. 15, 40 S.Ct. 50, 64 L.Ed. 103.

was to prevent the use of governmental force to search a man's person, house, papers and effects, and to prevent their search and seizure against his will. The exertion of force is not, however, essential to a prohibited search or seizure. It has, for example, been held that the search of a person's room without his consent during his absence therefrom constituted an illegal search where admittance was obtained by the use of a key the location of which had been disclosed to the officers by a neighbor of the person whose room was searched.⁷⁴ The secret extraction of one's papers by a federal officer from one's office while said officer was there on what purported to be a private business call violates this Amendment even though no force was used.⁷⁵ The decisive factor is the fact that the search of one's person and premises and the seizure of the papers or effects are without that person's consent.⁷⁶ The Supreme Court has, however, refused to extend the scope of search and seizure to include the secret tapping of one's telephone wires for the purpose of procuring evidence against him even when those acts violate the laws of the state in which they occur.⁷⁷

The question of whether a search or seizure is reasonable is a judicial question since it involves the construction of a constitutional provision. A search and seizure may invariably be made under a search warrant which conforms to the constitutionally prescribed requirements therefor and which is executed at a reasonable time. The Fourth Amendment authorizes the issuance of search warrants only upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized. A warrant issued solely on the basis of suspicion and belief without any statement of adequate supporting facts is therefore invalid, and this is true when issued in the enforcement of revenue laws as well as other laws.⁷⁸ The question of the adequacy of the supporting facts depends upon the facts of each specific case. A search warrant is also invalid if it fails to describe with sufficient particularity the place to be searched

⁷⁴ *Weeks v. United States*, 232 U. S. 383, 34 S.Ct. 341, 58 L.Ed. 652, L. R.A.1915B, 834, Ann.Cas.1915C, 1177.

⁷⁵ *Gould v. United States*, 255 U. S. 298, 41 S.Ct. 261, 65 L.Ed. 647.

⁷⁶ *Amos v. United States*, 255 U.S. 313, 41 S.Ct. 266, 65 L.Ed. 654.

⁷⁷ *OLMSTEAD v. UNITED STATES*, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944, 66 A.L.R. 376, Black's Cas. Constitutional Law, 2d, 634. See important dissenting opinions in this case.

⁷⁸ *Nathanson v. United States*, 290 U.S. 41, 54 S.Ct. 11, 78 L.Ed. 159.

and the persons or things to be seized. This requirement was intended to prevent the federal government from resorting to general warrants of the kind that had proven so efficient an instrument of executive tyranny in England and the colonies. This requirement is enforced by holding invalid the seizure of any person or thing not particularly described in the warrant unless the seizure would have been valid if made without a warrant.⁷⁹ There is another important limitation on the right of search and seizure even when based on a warrant conforming to these several constitutional requirements. It has been held that a search and seizure under a warrant issued for the sole purpose of searching out evidence to be used against the owner of the seized articles is in itself a violation of the Fourth Amendment.⁸⁰ This is a defect that is not cured by the fact that the warrant was issued on adequate grounds and was framed with sufficient particularity. The rule is based on the theory that the Amendment was intended to prevent the federal government from compelling a person to furnish it with evidence that would enable it to prove his guilt, and is thus an important safeguard of the privilege against self-incrimination guaranteed him by the Fifth Amendment.⁸¹ If, however, the goods directed to be seized are contraband or stolen or forfeited articles, their seizure under such a warrant is valid even though the articles constitute evidence against the person whose effects were thus seized. The fact that the public is deemed to have an interest in them apart from their character as evidence excludes their seizure from the rule that a search warrant issued solely for the purpose of obtaining evidence is invalid. Property liable to duties and concealed to avoid payment of them, counterfeit coin, burglar's tools and weapons, and implements of gambling are common examples of contraband, as were intoxicating liquors during the period while the Eighteenth Amendment was in force.⁸²

⁷⁹ *Marron v. United States*, 275 U. S. 192, 48 S.Ct. 74, 72 L.Ed. 231.

⁸⁰ *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746; *Gould v. United States*, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647.

⁸¹ See *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746, for a discussion of the relations between

the Fourth Amendment, U.S.C.A. Const., and the privilege against self-incrimination secured by a provision in the Fifth Amendment, U.S. C.A.Const.

⁸² See discussion of this matter in *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746, and *Gould v. United States*, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647.

The fact that the Fourth Amendment lays down certain requirements for issuing search warrants does not, however, mean that a warrant is indispensable to the existence of a valid search and seizure. There are circumstances in which a warrant is constitutionally required. Thus, the search of a person's house without a valid search warrant has been held to be in itself an unreasonable search unless made as an incident to a lawful arrest therein,⁸³ and this principle has been said to extend to any place or structure in respect of which a proper official warrant may readily be obtained.⁸⁴ It applies, in the case of one's house, even to the search for and seizure of contraband and forfeited goods.⁸⁵ However, a search and seizure without a warrant is valid in the case of contraband or forfeited goods being transported by ship, automobile or other vehicle, but only if the officer making it has reasonable or probable cause for believing that ship or vehicle contains contraband or forfeited goods.⁸⁶ The reason for this rule is the difficulties that would attend the enforcement of laws if a search warrant were required since the goods might be removed beyond the jurisdiction during the time required to obtain the warrant. The most important exception, however, to the necessity for a search warrant is the right of search and seizure as an incident to a lawful arrest. A lawful arrest may be made either while a crime is being committed or after its completion. The right to search includes in both instances that of searching the person of him who is arrested in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, and weapons or other things that might be used to effect an escape from custody.⁸⁷ It also includes, in the case of an arrest while the crime is being committed, the right to search the premises where it is being committed and to seize things of the character last referred to,⁸⁸ but the right is probably somewhat more limited in the case of an arrest made for a past

⁸³ *Agnello v. United States*, 269 U. S. 20, 46 S.Ct. 4, 70 L.Ed. 145, 51 A.L.R. 409.

⁸⁴ See *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543, 39 A.L.R. 790.

⁸⁵ *Gould v. United States*, 255 U. S. 298, 41 S.Ct. 261, 65 L.Ed. 647.

⁸⁶ *Carroll v. United States*, 267 U. S. 132, 45 S.Ct. 280, 69 L.Ed. 543;

Husty v. United States, 282 U.S. 694, 51 S.Ct. 240, 75 L.Ed. 629.

⁸⁷ *Agnello v. United States*, 269 U. S. 20, 46 S.Ct. 4, 70 L.Ed. 145, 51 A.L.R. 409.

⁸⁸ *Agnello v. United States*, 269 U. S. 20, 46 S.Ct. 4, 70 L.Ed. 145, 51 A.L.R. 409; *Marron v. United States*, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231.

and completed offense. It does not extend to any premises other than that where the crime was being committed or the arrest made, as the case may be.⁸⁹ The right to search the premises as an incident to a lawful arrest thereon is in no event more extensive than that permitted under a valid search warrant, and exploratory searches of the premises for the sole purpose of obtaining evidence against the arrested person are invalid.⁹⁰ The right of search and seizure without a search warrant as an incident to a lawful arrest exists even when the arrest is made in a private dwelling.⁹¹ An arrest may not, however, be used as a pretext to search for evidence.⁹²

Compulsory Production of Papers

It does not require an actual entry upon premises and a physical search for and seizure of papers and effects to constitute an unreasonable search and seizure within the meaning of the Fourth Amendment. Its purpose includes protecting one against the compulsory production of his private books and papers. A search warrant is but one means by which an invasion of that right may be attempted. A subpoena duces tecum is another, and may constitute an unreasonable search and seizure. It is such if it is too broad and sweeping in its terms just as a search warrant would be that was couched in similar terms.⁹³ It is also invalid if its sole purpose is to discover evidence against the person to whom it is directed where its enforcement would amount to a violation of his privilege against self-incrimination.⁹⁴ It does so only if he is the owner of the books and papers required to be produced. The custodian of corporate records may, accordingly, be required to produce them although they contain matter incriminating him since the order is not compelling him to produce his own effects for use against him.⁹⁵ It has also been held that corporate records remain impressed

⁸⁹ *Agnello v. United States*, 269 U. S. 20, 46 S.Ct. 4, 70 L.Ed. 145, 51 A. L.R. 409.

⁹⁰ *United States v. Lefkowitz*, 285 U.S. 452, 52 S.Ct. 420, 76 L.Ed. 877, 82 A.L.R. 775; *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 374.

⁹¹ *Agnello v. United States*, 269 U. S. 20, 46 S.Ct. 4, 70 L.Ed. 145.

⁹² *United States v. Lefkowitz*, 285 U.S. 452, 52 S.Ct. 420, 76 L.Ed. 877, 82 A.L.R. 775.

⁹³ *Hale v. Henkel*, 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652.

⁹⁴ *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746.

⁹⁵ *Wilson v. United States*, 221 U.S. 361, 31 S.Ct. 538, 55 L.Ed. 771, Ann. Cas.1912D, 558.

with the incidents attending them while owned by the corporation even in the hands of a legal owner to whom they have been transferred after the dissolution of the corporation, and that such owner's rights under the Fourth and Fifth Amendments are not violated by an order compelling him to produce them.⁹⁶ A subpoena duces tecum has been held to violate a corporation's rights under the Fourth Amendment where issued solely on the basis of information derived by the government through an invalid seizure of the documents directed to be produced.⁹⁷ A subpoena duces tecum reasonable in scope and not issued solely to discover evidence against the person to whom directed does not violate the Fourth Amendment.⁹⁸ A claim is also frequently made that the Amendment is violated by statutes that require those engaged in certain businesses to file reports and submit their books and records to inspection by public authorities. These requirements are held valid whenever reasonably proper for the public control and regulation of any business activities.⁹⁹ The same principles would validate legislation requiring reports and inspections in connection with the enforcement of taxes,¹ and also legislation requiring records to be kept for the information of the federal government.²

Persons Protected by Fourth Amendment

The language of the Fourth Amendment is most reasonably construed as conferring upon a person immunity from unreasonable searches and seizures of only his own person, house, papers and effects. This is also the construction which it has received. Hence incriminating papers belonging to one person may be used in evidence against another whom they incriminate.³ A search of premises, however, violates the rights of a lawful

⁹⁶ *Wheeler v. United States*, 226 U. S. 478, 33 S.Ct. 158, 57 L.Ed. 309; *Grant v. United States*, 227 U.S. 74, 33 S.Ct. 190, 57 L.Ed. 423.

⁹⁷ *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319, 24 A.L.R. 1428.

⁹⁸ *Brown v. United States*, 276 U.S. 134, 48 S.Ct. 288, 72 L.Ed. 500.

⁹⁹ *Bartlett Frazier Co. v. Hyde*, 7 Cir., 65 F.2d 350.

¹ *Flint v. Stone-Tracy Co.*, 220 U.S. 107, 31 S.Ct. 342, 55 L.Ed. 389, Ann. Cas.1912B, 1312.

² State decisions construe similar state constitutional provisions in the same manner: *State ex rel. McClory v. Donovan*, 10 N.D. 203, 88 N.W. 717; *Co-operative Building & Loan Ass'n v. State ex rel. Daniels*, 156 Ind. 463, 60 N.E. 146.

³ See, in addition to cases cited in footnotes 95 and 96, *Lewis v. United States*, 10 Cir., 92 F.2d 952.

occupant thereof as much as if he were its owner.⁴ A corporation is protected by the Amendment against unreasonable searches and seizures.⁵

Relation Between the Fourth and Fifth Amendments

It has been stated that the Fourth Amendment and that part of the Fifth which confers the privilege against compulsory self-incrimination are both parts of a general plan for protecting personal security, and that the unreasonable searches and seizures condemned by the former are almost always made for the purpose of compelling a person to give evidence against himself.⁶ The federal courts have given the Fifth Amendment a construction under which the use in evidence against a person of property obtained by the federal government in violation of his rights under the Fourth Amendment constitutes a violation of his rights under the Fifth.⁷ The rule has been severely criticized as an unnecessary protection of an accused and as increasing the difficulties of law enforcement, but has been defended with equal vigor as tending to reduce violations of the right against unreasonable searches and seizures by giving the injured party his most effective remedy. The majority of the cases heretofore cited to illustrate the limits of a valid search and seizure were cases in which the question arose as an incident to determining the admissibility of the seized objects in evidence. Since the privilege against compulsory self-incrimination may be waived, it is essential that the question of the validity of the seizure of the objects that it is proposed to use in evidence be timely raised. It is timely raised if made the basis for a preliminary motion for the return of the seized articles, or, where this is not reasonably possible, if made the basis for a motion to exclude them as evidence when tendered for that purpose.⁸ The Fourth Amendment, however, has an independent field of operation. This is established by the cases permitting

⁴ *Coon v. United States*, 10 Cir., 36 F.2d 164.

⁵ *Hale v. Henkel*, 201 U.S. 43, 26 S. Ct. 370, 50 L.Ed. 652; *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319, 24 A.L.R. 1426.

⁶ *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746.

⁷ See cases cited in footnotes 74 to 94, inclusive.

⁸ See *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652, L.R.A.1915B, 834, Ann.Cas.1915C, 1177; *Gould v. United States*, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647; *Agnello v. United States*, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145, 51 A.L.R. 409.

a corporation to invoke its protection despite the rule that it is not protected against compulsory self-incrimination.⁹ However, the principal applications of the Fourth Amendment have been, and continue to be, those in which it operates along with the Fifth Amendment to make effective the latter's guarantee against compulsory self-incrimination.

Searches and Seizures by a State

The Fourth Amendment does not apply to the states. Nor has it yet been decided that any provision of the federal Constitution accords a person against a state any immunity of the kind that he is accorded against the federal government by that Amendment.¹⁰ It is not improbable that the liberty protected by the due process clause of the Fourteenth Amendment may ultimately be expanded to include some aspects of that immunity, but it has not yet been so interpreted. The constitution of each state prohibits unreasonable searches and seizures in language very similar to that contained in the Fourth Amendment. It is beyond the purview of this text to discuss the state courts' constructions of those provisions beyond stating that they have in general construed them in the same manner as the federal courts have construed the Fourth Amendment.¹¹ There is, however, one marked difference. The majority of the states have held that the privilege against compulsory self-incrimination, which is also guaranteed by state constitutional provisions, is not violated by the use in evidence of articles obtained by an unconstitutional search and seizure.¹²

⁹ *Hale v. Henkel*, 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652; *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319, 24 A.L.R. 1426; *Essgee Co. of China v. United States*, 262 U.S. 151, 43 S.Ct. 514, 67 L.Ed. 917.

¹⁰ See in this connection *Consolidated Rendering Co. v. State of Vermont*, 207 U.S. 541, 28 S.Ct. 178, 52 L.Ed. 327, 12 Ann.Cas. 658.

¹¹ See, for examples, *McClurg v. Brenton*, 123 Iowa 368, 98 N.W. 881,

65 L.R.A. 519, 101 Am.St.Rep. 323. *Washington Nat. Bank v. Daily*, 166 Ind. 631, 77 N.E. 53; *Lippman v. People*, 175 Ill. 101, 51 N.E. 872.

¹² See *People v. Defore*, 242 N.Y. 13, 150 N.E. 585, which reviews this matter and discusses the status of the rule in the several states. *Certiorari* was denied without opinion in *Defore v. People of State of New York*, 270 U.S. 657, 46 S.Ct. 353, 70 L.Ed. 784.

QUARTERING OF SOLDIERS

310. The Third Amendment to the federal Constitution provides that "No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law." There appear to have been no decisions construing the meaning of this Amendment.

POLITICAL RIGHTS

311. The right of suffrage is a political right. The federal Constitution does not confer it upon citizens of the states except as it provides that electors of Representatives and Senators in Congress shall have the qualifications requisite for electors of the most numerous branch of the state legislature. The right is, in all other respects, left to be defined by the respective states, subject, however, to the limitations contained in the Thirteenth, Fourteenth, and Nineteenth Amendments to the federal Constitution.
312. The right to peaceably assemble and to petition the government is guaranteed by the First Amendment against abridgment by Congress. The due process clause of the Fourteenth Amendment protects the people of a state against state action similar to that which Congress is prohibited from taking by the First Amendment. The constitutions of many of the states contain a provision similar to the First Amendment.

Citizenship

There are various types of relationship which a person may sustain towards the politically organized society to which he belongs. The two most fundamental for the purpose of defining his political rights are those of citizenship and non-citizenship. It has been said to be "the inherent right of every independent nation to determine for itself, and according to its own Constitution and laws, what classes of persons shall be entitled to its citizenship."¹³ The federal Constitution now provides that all persons born or naturalized in the United States, and subject to its jurisdiction, shall be citizens of the United States, and of the

¹³ United States v. Wong Kim Ark,
169 U.S. 649, 18 S.Ct. 456, 42 L.Ed.
890.

state in which they reside,¹⁴ and also confers upon Congress the power to pass uniform naturalization laws.¹⁵ The judicial construction of these provisions, as well as problems of federal citizenship generally, have already been considered.¹⁶ It is sufficient for present purposes to merely state that our constitutional system recognizes both a federal and a state citizenship, and that each of them involves distinct complexes of rights and privileges that have already been discussed to some extent in other connections.¹⁷

Right of Suffrage

The federal Constitution does not confer the right to vote upon any person, not even upon those who are citizens of the United States or of a state. The attempt to include that right among the privileges and immunities of federal citizenship which are secured against abridgment by a state by the privileges and immunities clause of the Fourteenth Amendment was defeated in a case sustaining a state's action in denying the right to women who were citizens of both the United States and the state.¹⁸ The same case also held that woman suffrage was not essential to the existence within a state of a republican form of government. The United States has no voters in the states of its own creation except insofar as the Constitution has expressly provided that the members of the House of Representatives and of the Senate shall be elected in each state by electors having the qualifications requisite for electors for the most numerous branch of the state legislature.¹⁹ This right to vote is a federal right the exercise of which Congress may protect by suitable legislation.²⁰ The action of the state is, however, requisite in order to define the class possessing it, and it is in that sense only that it is correct to say that the right to vote is a matter for each state to determine for itself.²¹ The right to vote for state or local officers, or

¹⁴ U.S.C.A.Const. Amend. 14, Section 1.

¹⁵ U.S.C.A.Const. Art. 1, Section 8, Clause 4.

¹⁶ See Chapter 10, Sections 182-183.

¹⁷ See Chapter 5, Sections 97-99, and Chapter 14, Sections 230, 231.

¹⁸ *Minor v. Happersett*, 21 Wall. 162, 22 L.Ed. 627.

¹⁹ U.S.C.A.Const. Article 1, Section 2, Clause 1 (members of House of Representatives); U.S.C.A.Const. Amend. 17, Section 1 (members of the Senate).

²⁰ *Ex parte Yarborough*, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274.

²¹ *POPE v. WILLIAMS*, 193 U.S. 621, 24 S.Ct. 573, 48 L.Ed. 817, *Black's Cas. Constitutional Law*, 2d, 640.

on purely state matters, is neither conferred by any provision of the federal Constitution nor has any branch of the federal government the power to confer it. It is a matter that each state may determine for itself subject to certain limitations contained in the federal Constitution.

The Constitution as originally adopted contained no provision limiting a state's power of conferring the right to vote. It now contains two specific limitations thereon. The first of these is found in the Fifteenth Amendment which provides that "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." This Amendment does not confer the right of suffrage on any person, although by its automatic invalidation of any state constitutional or statutory provision denying the right for one of the proscribed reasons it may operate to permit one to vote under that part of the constitutional or statutory provision that remains after the invalid part has been stricken therefrom.²² A state is not permitted to evade this restriction by ostensibly making denial of the right depend upon failure to meet a test which it might otherwise validly prescribe. It has, accordingly, been held that a state constitutional provision violated this Amendment which denied the right to vote to those who could not read and write any section of the state constitution but which excepted therefrom all those who on January 1, 1866, or prior thereto, had the right to vote under any form of government, or who at that time resided in a foreign nation, or who were the lineal descendants of any of the foregoing excepted persons.²³ This was held to be an indirect attempt to deny the right to vote on account of race and color, and negroes who could not meet the prescribed test were held entitled to vote despite that failure. The other specific limitation on a state's power of regulating the right of suffrage is found in the Nineteenth Amendment which provides that "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex." Its form is precisely like that of the Fifteenth Amendment and its scope and effect are similar except that sex rather than color is

²² *Guinn v. United States*, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340, L.R. A.1916A, 1124.

²³ *Guinn v. United States*, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340, L.R.

A.1916A, 1124; see also *Myers v. Anderson*, 238 U.S. 368, 35 S.Ct. 932, 59 L.Ed. 1349, holding invalid a statute of similar purport which regulated the right of municipal suffrage.

the proscribed basis. It is self-executing, and no legislation by either Congress or a state legislature was necessary to remove restrictions on the right to vote based on sex which existed at the time of its adoption.²⁴ It has been held not to be violated by a statute conditioning the right to vote on the payment of all poll taxes due the state for any year merely because women were accorded more favorable treatment in this respect by being required to pay the tax only for the year of their registration for voting.²⁵ This was said not to make the abridgment of the right to vote resulting from the statute one based on sex.

The equal protection clause of the Fourteenth Amendment constitutes another limitation on a state's power of defining and regulating the right to vote. An intimation to this effect is found in a case sustaining a state's power to make residence within the state for a given period a prerequisite to the right to vote.²⁶ The cases in which the equal protection clause has been definitely held to prevent unreasonable discriminations in defining the right to vote involved the exclusion of negroes from participation in the primary elections of the Democratic party in some of the southern states. The issue principally discussed in most of these cases was whether the action of the party constituted action by the state since the equal protection clause would apply only if it were such. It is held to be such whenever the authority exercised by the party officials in prescribing the rule of exclusion is derived from or based upon state legislation,²⁷ but held not to be such when their authority is derived from the convention of the party which is for this purpose treated as a voluntary association.²⁸ It is, however, held that a rule excluding negroes from the party primary violates the equal protection clause if the rule providing therefor involves state action under the principles set

²⁴ *State v. Walker*, 192 Iowa 823, 185 N.W. 619; *Foster v. Mayor and Council of College Park*, 155 Ga. 174, 117 S.E. 84.

²⁵ *Breedlove v. Suttles*, 302 U.S. 277, 58 S.Ct. 205, 82 L.Ed. 252.

²⁶ *POPE v. WILLIAMS*, 193 U.S. 621, 24 S.Ct. 573, 48 L.Ed. 817, *Black's Cas. Constitutional Law*, 2d, 640.

²⁷ *NIXON v. HERNDON*, 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759,

Black's Cas. Constitutional Law, 2d, 642; *West v. Bliley*, D.C., 33 F.2d 177; *Nixon v. Condon*, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984, 88 A.L.R. 458; *White v. County Democratic Executive Committee of Harris County*, D.C., 60 F.2d 973.

²⁸ *Grove v. Townsend*, 295 U.S. 45, 55 S.Ct. 622, 79 L.Ed. 1292, 97 A.L.R. 680; *Drake v. Executive Committee of Democratic Party for City of Houston*, D.C., 2 F.Supp. 486.

forth above.²⁹ The Supreme Court has not based its decisions in this type of case on the Fifteenth Amendment, nor has it discussed the issue whether a primary is or is not an election.³⁰ A lower federal court has, however, held a party rule of the foregoing character violative of both the equal protection clause and of the Fifteenth Amendment where the party's action was deemed to involve action by the state.³¹ The foregoing principles would apply if the state should undertake such exclusion by direct legislation, and also to any other unreasonable bases for exclusion, including those specified in the Fifteenth and Nineteenth Amendments.

Rights of Assembly and Petition

The First Amendment to the federal Constitution provides that Congress shall make no law abridging "the right of the people peaceably to assemble, and to petition the government for a redress of grievances." The rights guaranteed hereby are important political rights. The scope of said guaranties has been frequently considered, but decisions thereon are conspicuous by their scarcity. It has been held that this is a right of federal citizenship, and stated that it is as such within the protection of Congress against invasion by the acts of private persons.³² The right protected against Congressional action covers only assemblies for the purpose of petitioning the government for a redress of grievances,³³ but this is too narrow unless construed to include the right to assemble generally for the discussion of political matters and other matters of national interest or for any other lawful purpose. A state is as much prohibited from interfering with its exercise as are private persons or Congress.³⁴

²⁹ NIXON v. HERNDON, 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759, Black's Cas. Constitutional Law, 2d, 642; Nixon v. Condon, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984, 88 A.L.R. 458.

³⁰ See Chandler v. Neff, D.C., 298 F. 515, holding not violative of either the Fourteenth or Fifteenth Amendment, U.S.C.A.Const., a state statute prohibiting negroes from voting in Democratic primaries on the theory that a primary is not an election. This case is not longer law in view of the decisions cited in footnote 29, supra.

³¹ West v. Biley, D.C., 33 F.2d 177; see also Grove v. Townsend, 295 U.S. 45, 55 S.Ct. 622, 79 L.Ed. 1292, 97 A.L.R. 680; holding exclusion of negroes from Democratic primaries violative of neither the Fourteenth or Fifteenth Amendment, U.S.C.A.Const., where exclusion was not imputable to state action.

³² United States v. Cruikshank, 92 U.S. 542, 23 L.Ed. 588.

³³ United States v. Cruikshank, 92 U.S. 542, 23 L.Ed. 588.

³⁴ Presser v. State of Illinois, 116 U.S. 252, 6 S.Ct. 580, 29 L.Ed. 615;

This provision of the First Amendment does not, however, limit the states except insofar as it prohibits them from interfering with the right of their peoples to assemble for the purpose of petitioning the federal government for a redress of grievances against it.³⁵ The Supreme Court has, however, construed the liberty which is protected against state action by the due process clause of the Fourteenth Amendment to include the right of peaceable assembly, and has thus protected the right of the people to assemble for purposes of peaceful political discussion and action.³⁶ A statute that makes it a crime to hold peaceable meetings for that purpose, or to assist in their conduct, violates that right.³⁷ The right is, however, just as much subject to reasonable regulation as are the other personal and property rights protected by the due process clause of the Fourteenth Amendment. The Court has thus far usually discussed it along with freedom of speech. The constitutions of many of the states contain provisions similar to that part of the First Amendment herein considered.³⁸ The right protected by such state constitutional provisions has been held to include that of a person to communicate his opinions through the medium of a public address to members of an audience assembled in a proper place to hear it.³⁹ It does not, however, include the right to hold a public meeting in a public street, and permits may be required for that purpose.⁴⁰ There have been cases in which it has been held that the right included that of nominating candidates for public office by petition.⁴¹ This seems an extreme position.

see also dissenting opinion of Mr. Justice Brandeis in *Gilbert v. State of Minnesota*, 254 U.S. 325, 41 S.Ct. 125, 65 L.Ed. 287.

³⁵ *United States v. Cruikshank*, 92 U.S. 542, 23 L.Ed. 588.

³⁶ *DE JONGE v. STATE OF OREGON*, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278, *Black's Cas. Constitutional Law*, 2d, 644; *Herndon v. Lowry*, 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066.

³⁷ *DE JONGE v. STATE OF OREGON*, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278, *Black's Cas. Constitutional Law*, 2d, 644.

³⁸ See following cases construing

such state constitutional provisions: *Commonwealth v. Abrahams*, 156 Mass. 57, 30 N.E. 79; *State ex rel. Ragan v. Junkin*, 85 Neb. 1, 122 N.W. 473, 23 L.R.A., N.S., 839; *State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 125 N.W. 961, 20 Ann.Cas. 633; *State v. Butterworth*, 104 N.J.Law, 579, 142 A. 57, 58 A.L.R. 744.

³⁹ *City of Louisville v. Lougher*, 209 Ky. 299, 272 S.W. 748.

⁴⁰ *People ex rel. Doyle v. Atwell*, 232 N.Y. 96, 133 N.E. 364, 25 A.L.R. 107.

⁴¹ *State ex rel. Holliday v. O'Leary*, 43 Mont. 157, 115 P. 204; *Britton v. Board of Election Com'rs*, 129 Cal. 337, 61 P. 1115, 51 L.R.A. 115.

FREEDOM OF SPEECH AND PRESS

313. The First Amendment to the federal Constitution provides that Congress shall make no law abridging the freedom of speech or of the press. Similar guaranties against state action are found in the constitutions of the several states. These rights are also secured against abridgment by the states by that provision of the Fourteenth Amendment to the federal Constitution which prohibits a state from depriving a person of liberty without due process of law.

The value of freedom of speech and press for the maintenance of a political system in which decisions are arrived at by discussion rather than by violence has long been recognized. They rank high among an individual's political rights. That is not, however, their only significance since there are other interests that can be most effectively promoted only where those rights are adequately secured. Their protection has also a general social value. The recognition of their individual and social value is the ultimate basis for the protection which has been accorded them by both the federal and state constitutions. The provisions of the First Amendment are by its terms limited to the abridgment of these rights by Congress and thus afford no protection against their invasion by state action. It has, however, been definitely determined that freedom of speech and press are a part of the liberty protected against unreasonable restriction by the due process clause of the Fourteenth Amendment.⁴² They are also protected against infringement by the several states by provisions of their respective constitutions. The judicial development of the scope of these various protective provisions has been influenced to a considerable extent by historical considerations and by theories as to the social and political objectives that were aimed at by them.

It has always been recognized that the freedom of speech and press secured by these provisions were not absolute rights immu-

⁴² *Gitlow v. People of State of New York*, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138; *Whitney v. People of State of California*, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095; *Fiske v. State of Kansas*, 274 U.S. 380, 47 S.Ct. 655, 71 L.Ed. 1108; *Stromberg v. People of State of California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117,

73 A.L.R. 1484; *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357; *DE JONGE v. OREGON*, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278, *Black's Cas. Constitutional Law*, 2d, 644; *Herndon v. Lowry*, 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066.

nizing one against all liability for whatever he might speak or publish, but that they were subject to regulation and some restriction for the public welfare.⁴³ The principal problem has been to define the limits of permissible regulation and curtailment of those rights. The existence of these various constitutional guaranties has not rendered unconstitutional the laws imposing civil liability for uttering or publishing slanderous or libellous matter, nor every law publishing the uttering or publication of even truthful statements regardless of circumstances. Nor have they invalidated statutes against speaking or publishing blasphemous and obscene matter.⁴⁴ The majority of the cases decided by the Federal Supreme Court in construing the First Amendment and the due process clause of the Fourteenth Amendment have involved the right of the federal government or of a state to limit these rights for the purpose of protecting the respective governments against seditious utterances. Freedom of speech and press are not violated by legislation punishing advocacy of violations of the criminal law,⁴⁵ or the use of violence or unlawful means instead of peaceful political action as a means for effecting political, social or economic changes.⁴⁶ Freedom of speech and of the press are subordinate to the rights of the nation and state to preserve themselves. It is on that basis that statutes have been sustained which, as construed by the courts, punished those who wilfully and deliberately assisted in organizing a society for the purpose of carrying on a revolutionary class struggle by criminal methods.⁴⁷ It is, however, a violation of the right of free speech to make it a crime to assist in forming an organization for effecting social and political changes by non-violent and peaceable means,⁴⁸ or to make it a crime to par-

⁴³ See *Schenck v. United States*, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470, in which it is said that "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic." See also *Frohwerk v. United States*, 249 U.S. 204, 39 S.Ct. 249, 63 L.Ed. 561, in which it is stated that the First Amendment, U.S.C.A.Const. "cannot have been, and obviously was not, intended to give immunity for every possible use of language."

⁴⁴ *Williams v. State*, 130 Miss. 827, 94 So. 882; *State v. Mockus*, 120 Me.

84, 113 A. 39, 14 A.L.R. 871; *State v. Van Wye*, 136 Mo. 227, 37 S.W. 938, 58 Am.St.Rep. 627.

⁴⁵ *Fox v. State of Washington*, 236 U.S. 273, 35 S.Ct. 383, 59 L.Ed. 573.

⁴⁶ *Gitlow v. People of State of New York*, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138; *People v. Lloyd*, 304 Ill. 23, 136 N.E. 505; *People v. McClenegen*, 195 Cal. 445, 234 P. 91.

⁴⁷ *Whitney v. People of State of California*, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095.

⁴⁸ *Fiske v. State of Kansas*, 274 U.S. 380, 47 S.Ct. 655, 71 L.Ed. 1108.

ticipate in, or assist in the conduct of, a public meeting held under the auspices of a political party whose tenets include political change by resort to violence where there was no advocacy of change by those methods at the meeting.⁴⁹ A statute prohibiting the display of a red flag as a symbol of opposition to organized government even by peaceful and legal means has also been held to violate the liberty secured by the Fourteenth Amendment.⁵⁰ Legislation restricting freedom of speech has been sustained whenever the acts prohibited have been clearly injurious to the safety of the nation or state, or have been done with the intention of bringing about those substantive evils which the nation or state has a right to prevent. The Supreme Court has refused to accept as a test of validity whether the "words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils" that government has a right to prevent.⁵¹ In applying the test actually employed the intent is permitted to be deduced from the consequences reasonably to be expected to follow from the acts in question.

The principles set forth in the preceding paragraph are also applicable in defining the extent to which the federal government or a state may limit the freedom of the press. There is, however, one problem that has been raised in connection with it that was not considered in the cases heretofore discussed. That is the problem of a censorship of the press. It has been stated that one of the chief purposes of the First Amendment was to prevent the imposition of restraint prior to publication,⁵² and even affirmed that that was its sole purpose.⁵³ The latter position is not law as is shown by the decisions cited in connection with the preceding paragraph. It is still, however, the almost universal rule that legislation that imposes any restraint prior to publication is an unconstitutional invasion of the freedom of the press. It is on this basis that a state statute declaring the business of regularly publishing scandalous and defama-

⁴⁹ *DE JONGE v. OREGON*, 299 U. S. 353, 57 S.Ct. 255, 81 L.Ed. 278, Black's Cas. Constitutional Law, 2d, 644; *Herndon v. Lowry*, 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066.

⁵⁰ *Stromberg v. People of State of California*, 282 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117, 73 A.L.R. 1484.

⁵¹ See *Schenck v. United States*,

249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470; *Abrams v. United States*, 250 U.S. 616, 40 S.Ct. 17, 63 L.Ed. 1173.

⁵² *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357; *Patterson v. State of Colorado*, 205 U.S. 454, 27 S.Ct. 556, 51 L.Ed. 879, 10 Ann.Cas. 689.

⁵³ 2 Story, Constitution, § 1880.

tory newspapers a nuisance, and authorizing the enjoining of their publication, was held to violate the due process clause of the Fourteenth Amendment as an invasion of the freedom of the press.⁵⁴ It was also held in that case that the prohibition could not be evaded by calling the exercise of the right a nuisance, and that immunity from previous restraint is not lost because charges are made of derelictions that constitute crimes nor because the statements made are false.⁵⁵ The Court construed the case as involving an exercise of the right for purposes of carrying on political discussions, but its scope includes the discussion of any other matter of general public interest and, perhaps, of those of a primarily private interest as well. The same liberty has more recently been held violated by an ordinance prohibiting the peaceable distribution of books and pamphlets without a license.⁵⁶ The case in question involved the distribution of religious literature. The Court stated in its opinion that the ordinance struck at the very foundation of freedom of the press by subjecting it to license and censorship. It also held that liberty of the press is not confined to newspapers and periodicals, but embraces pamphlets and every character of publication affording a vehicle of information and opinion, and that it also included liberty of circulation as well as of publication. It was because a license tax on the gross receipts of those engaged in the business of selling advertising printed in newspapers was considered by the Court to be a deliberate and calculated device to limit the circulation of information that the statute was held an invalid interference with the freedom of the press guaranteed by the Fourteenth Amendment.⁵⁷ It has, however, been held that it is no violation of the First Amendment for Congress to prescribe the conditions on which newspapers and other periodicals may enjoy second-class mailing privileges,⁵⁸ or to exclude from the mails material containing seditious matter.⁵⁹ Protection against previous restraint is not, however, absolutely unlimited.⁶⁰ The Court in the

⁵⁴ *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357.

⁵⁵ As to the last part of this statement see also discussion in *Patterson v. State of Colorado*, 205 U.S. 454, 27 S.Ct. 556, 51 L.Ed. 879, 10 Ann.Cas. 689.

⁵⁶ *Lovell v. City of Griffin*, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949.

⁵⁷ *Grosjean v. American Press Co.*,

297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660.

⁵⁸ *Lewis Pub. Co. v. Morgan*, 229 U.S. 288, 33 S.Ct. 867, 57 L.Ed. 1190.

⁵⁹ *United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson*, 255 U.S. 407, 41 S.Ct. 352, 65 L.Ed. 704.

⁶⁰ *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357.

case last cited stated that the United States would have a clear right to prevent the publication of military secrets, and that the "primary requirements of decency might be enforced against obscene publications."⁶¹ Although most of the cases cited in this paragraph involved constructions of the due process clause of the Fourteenth Amendment, they may reasonably be taken to indicate the content of the freedom of the press guaranteed by the First Amendment.

It may safely be stated in conclusion that the courts have in general construed freedom of speech and press so as to preserve the fundamental values intended to be protected by the constitutional provisions protecting them. This is especially true of the decisions of the federal Supreme Court. Even it, however, has recognized that the scope of those guaranties is dependent upon time and place, and that greater restrictions thereon are permissible during war than during peace.⁶²

⁶¹ See, in that connection, *Mutual Film Corporation v. Industrial Commission of Ohio*, 236 U.S. 230, 35 S. Ct. 387, 59 L.Ed. 552, Ann.Cas.1916C, 296, sustaining as not violative of a state constitutional provision protecting freedom of speech and press a state statute providing for the censorship of motion pictures.

⁶² *Schenk v. United States*, 249 U. S. 47, 39 S.Ct. 247, 63 L.Ed. 470. As to relation of freedom of speech and press to problem of contempt of court for criticisms of courts, see *Patterson v. State of Colorado*, 205 U.S. 454, 27 S.Ct. 556, 51 L.Ed. 879,

10 Ann.Cas. 689, and *Toledo Newspaper Co. v. United States*, 247 U.S. 402, 38 S.Ct. 560, 62 L.Ed. 1186. That the provisions of the National Labor Relations Act, 29 U.S.C.A. §§ 151-163, construed to permit the National Labor Relations Board to order the Associated Press to reinstate employees engaged in editing news where they had been discharged for union activities, does not violate the freedom of the press guaranteed by the First Amendment, see *Associated Press v. National Labor Relations Board*, 301 U.S. 103, 57 S.Ct. 650, 81 L.Ed. 953.

CHAPTER 20

LIMITS ON THE DEFINITION OF CRIME AND THE ENFORCEMENT OF CRIMINAL LAWS

- 314. General Considerations.
- 315-316. Defining What Shall Constitute Crimes.
- 317-318. Ex Post Facto Laws.
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- 328. Double Jeopardy.
- 329. Punishment for Crime.
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GENERAL CONSIDERATIONS

- 314. It is an essential part of our constitutional system to impose limits upon government in the enactment and enforcement of penal legislation. The limits imposed upon the federal government in this matter are all found in the federal Constitution. The limits imposed upon each of the several states in this matter are found in the federal Constitution and in its own state constitution.**

The power to define and punish crimes constitutes an important part of a government's machinery for effectuating its policies. It includes the powers of providing a governmental mechanism for the application of the criminal law to specific cases, of prescribing rules of procedure for the trial of those charged with a violation of that law, and of enforcing the prescribed punishment against those duly convicted of its violation. The United States and each of the several states possess this general power. Its exercise by them is, however, subject to important constitutional limitations which restrict them both in defining crimes, in devising procedures for the enforcement of the criminal law, and in prescribing punishments for its violation. The only limitations upon the federal government in these matters are found in the federal Constitution. The majority of them are found in the Fifth, Sixth and Eighth Amendments.

These apply to the federal government only.¹ The rights and immunities which are protected against federal action by these provisions are among the privileges and immunities of federal citizenship which a state is prohibited from abridging by the provisions of the privileges and immunities clause of the Fourteenth Amendment. The attempt to interpret that provision to mean that the states were subject to the same limitations as those imposed upon the federal government by the Fifth, Sixth and Eighth Amendments has invariably been rejected by the Supreme Court.² There are, however, certain provisions of the federal Constitution that limit the several states in the enactment and enforcement of penal legislation. The most important of these are the provision prohibiting *ex post facto* laws and the due process and equal protection clauses of the Fourteenth Amendment. These have not been so construed as to impose upon the states precisely the same limitations as are imposed upon the federal government by those provisions of the federal Constitution that limit it in its employment of penal legislation for the purposes of effectuating its policies. The constitutions of nearly all of the states, however, contain provisions similar in language and purpose to those found in the federal Constitution as limitations upon the federal government. There are some instances in which the state and federal constitutions both impose similar limitations upon a state. Thus both generally prohibit the enactment of *ex post facto* laws. It should be noted that there is in such case no constitutional requirement that the content of the state and federal constitutional provisions be identical. The state would not be prohibited by the *ex post facto* clause of the federal Constitution from so construing a similar clause in its state constitution as to prohibit legislation which would not be invalid under the *ex post facto* clause of the federal Constitution. It could not, however, so construe its own constitutional provision as to permit what the federal constitutional provision prohibited since the latter is a limit upon a state's constitution as well as upon its ordinary legislation. The same principles apply whenever a federal and a state constitutional provision limit a state in the enactment and enforcement of its penal laws.

¹ *Fox v. Ohio*, 5 How. 410, 12 L.Ed. 213; *Twitchell v. Pennsylvania*, 7 Wall. 321, 19 L.Ed. 223.

Dow, 176 U.S. 581, 20 S.Ct. 448, 44 L. Ed. 597; *Twining v. State of New Jersey*, 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97.

² See, for examples, *Maxwell v.*

DEFINING WHAT SHALL CONSTITUTE CRIMES

315. A state is not prevented by the due process clause of the Fourteenth Amendment from enforcing its legitimate policies by punishing those who violate the laws enacted by it to protect or promote those policies. It need not make conscious intent to do wrong an element in defining crimes. The limitations imposed in this respect upon the federal government by the due process clause of the Fifth Amendment are no greater than those imposed on a state by the similar clause of the Fourteenth Amendment.
316. The due process clause of the Fourteenth Amendment prohibits a state from enacting and enforcing penal legislation that fails to furnish an ascertainable standard of guilt or innocence. State constitutional provisions are also held to invalidate such legislation. The due process clause of the Fifth Amendment, and the Sixth Amendment, limit Congress in the same manner in its enactment of federal penal laws.

Due Process and the Definition of Crimes

A state may prescribe standards of conduct for those within its jurisdiction, and enforce compliance therewith by providing sanctions for their failure to do so. Its power to define that standard is subject to numerous constitutional restrictions the more important of which have already been discussed in previous chapters. A standard that violates any of these limitations may not be validly enforced by resort to any form of sanction. The criminal law constitutes but one of the possible sanctions that may be invoked to enforce compliance with legally prescribed standards of conduct that meet constitutional requirements so far as their substance is concerned. It has sometimes been contended that the due process clause of the Fourteenth Amendment limits a state in imposing penal sanctions for the enforcement of standards of conduct that are not in themselves unconstitutional and which could be validly enforced by invoking some other form of sanction such as the imposition of some form of civil liability. The substance of the claim is that punishment may be imposed for the violation of such standard only where the failure to conform to it is accompanied by a conscious intent to do wrong. It amounts to a claim that a state may not make the violation of a legally prescribed standard of conduct a crime unless conscious intent to do wrong is made an element in the definition of that crime. The logi-

cal consequences of that position would mean that a person could not be punished for voluntarily doing the prohibited act if he did not know that it was prohibited by law or if he mistakenly believed that his act was not the particular act prohibited by a law of whose existence he had knowledge. The Supreme Court has denied that due process requires conscious intent to do wrong to be made an element in the definition of a crime. It has, accordingly, sustained a statute imposing a penalty upon a person cutting timber from state-owned lands even as applied to one mistakenly believing that he had a right to do so.³ Due process does not require scienter to be made an element in defining a crime. A state court has held that the definition of incest need not include the element that the parties shall know that they are within the prohibited degree of relationship.⁴ A statute does not violate due process by punishing one who has purchased stolen property without knowledge of the fact that it had been stolen but who has failed to make diligent efforts to ascertain whether it had been stolen.⁵ It is thus apparent that due process imposes no general requirement that the existence of a conscious intent to do wrong shall constitute a condition precedent to the right of a state to enforce compliance with valid standards of conduct prescribed by it by punishing those who fail to comply. A state may provide that the mere doing of a particular act shall be at the risk of him who does it, without according him a right to plead his ignorance or good faith in defense against its claim to punish him therefor. It may do this whenever it is a reasonable means for the protection or promotion of a legitimate public or social interest.⁶ The assumption made in the cases thus far cited herein was that the person upon whom the prescribed punishment was inflicted voluntarily did the physical acts constituting the prohibited conduct, or voluntarily failed to do those things the failure to do which was made punishable. They do not decide that due process does not impose any limits upon a state's power to punish wholly involuntary conduct, or upon its power to punish one for the unintended and unforeseeable consequences of his voluntary acts or omissions. No data have been found war-

³ *Shevlin-Carpenter Co. v. State of Minnesota*, 218 U.S. 57, 30 S.Ct. 663, 54 L.Ed. 930.

⁵ *Rosenthal v. People of State of New York*, 226 U.S. 260, 33 S.Ct. 27, 57 L.Ed. 212, Ann.Cas.1914B, 71.

⁴ *State v. Glindemann*, 34 Wash. 221, 75 P. 800, 101 Am.St.Rep. 1001.

⁶ *Shevlin-Carpenter Co. v. State of Minnesota*, 218 U.S. 57, 30 S.Ct. 663, 54 L.Ed. 930.

ranting any significant generalization covering those problems. The same statement applies to the problem whether there are any circumstances under which it would be so unreasonable as to violate due process to enforce a valid standard of conduct by penal sanctions whether or not these made punishment contingent upon the presence of a conscious intent to do wrong. The answers to these several problems are to be found in the general principle that the due process clause prohibits legislation only if it is unreasonable and arbitrary. This test is applicable in determining the validity of a state's resort to penal sanctions to enforce its legitimate policies. The principles that define the limits imposed on the states by the due process clause of the Fourteenth Amendment in respect to the matters herein considered are in general applicable in defining the limits imposed in respect of those matters upon the federal government by the due process clause of the Fifth Amendment. It has been held that the latter is not violated by making a corporation or a voluntary association criminally liable for the acts of its agents performed in the course of their agency.⁷ The equal protection clause of the Fourteenth Amendment also limits a state in its definition of crimes. It may not so define monopoly as to deliberately single out one particular corporation and thus exclude from the scope of the statute others that might be equally guilty of attempts to obtain a monopoly.⁸

Requirement of Definite Standard

The power to define crimes and to prescribe punishments is a legislative function. It has frequently been stated that it is a fundamental principle of justice that those who are being subjected to the peril of punishment for the violation of a criminal statute are entitled to be informed in advance and with a reasonable degree of certainty just what conduct is prohibited and punishable. The adequate protection of this legitimate individual interest requires that the legislature shall not be permitted to define crimes in such vague and indefinite language as will fail to inform persons of common intelligence what conduct on their part will render them liable to penalties attached to the commission of such crimes. The federal Constitution has pro-

⁷ New York Cent. & H. R. R. Co. v. United States, 212 U.S. 481, 29 S. Ct. 304, 53 L.Ed. 613; United States v. Adams Exp. Co., 229 U.S. 381, 33 S.Ct. 878, 57 L.Ed. 1237.

⁸ McFarland v. American Sugar Refining Co., 241 U.S. 79, 36 S.Ct. 493, 60 L.Ed. 899.

tected this interest against invasion both by a state and by the United States. The due process clause of the Fourteenth Amendment voids state penal laws that make criminal liability depend upon a standard so vague and indefinite as to be practically impossible of ascertainment in advance.⁹ A statute that either forbids or requires the doing of an act in terms so vague that men of ordinary intelligence are compelled to guess at its meaning and must necessarily differ as to its application subjects conduct to an unreasonable risk and thus violates due process.¹⁰ The application of this general test to a particular statute is so dependent upon its own specific language as to practically make it a unique problem. The standard is deemed sufficiently definite if the language used in defining it has a technical or other special meaning well enough known to enable those within its reach to correctly apply it, or if it possesses a well settled common-law meaning.¹¹ Language originally indefinite may acquire a sufficient degree of definiteness as a result of its judicial construction, as where a statute punishing the printing of matter tending to encourage "disrespect for law" was construed as confined to that encouraging "an actual breach of the peace."¹² A statute punishing conduct producing an undue restraint of trade is not invalid on this score merely because it compels those subject to it to risk their liberty or property upon rightly estimating a matter of degree,¹³ but one that makes guilt or innocence turn on correctly guessing what would have been the price of a given article if non-existent conditions had existed is invalid as not furnishing a sufficiently definite standard of conduct.¹⁴ The majority of the decisions have concerned the issue whether the statute sufficiently defined the acts that were prohibited or commanded by it. Due process, however, also requires that the language used shall definitely and clearly provide that it shall be a crime to do, or fail to do, the acts described

⁹ *International Harvester Co. v. Commonwealth of Kentucky*, 234 U.S. 216, 34 S.Ct. 853, 58 L.Ed. 1284; *Connally v. General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322.

¹⁰ *Connally v. General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322.

¹¹ *Connally v. General Construc-*

tion Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322.

¹² *Fox v. State of Washington*, 236 U.S. 273, 35 S.Ct. 383, 59 L.Ed. 573.

¹³ *Nash v. United States*, 229 U.S. 373, 33 S.Ct. 780, 57 L.Ed. 1232.

¹⁴ *International Harvester Co. v. Commonwealth of Kentucky*, 234 U.S. 216, 34 S.Ct. 853, 58 L.Ed. 1284.

therein.¹⁵ Due process, that is, requires the legislature both to fix a readily ascertainable standard of the conduct required from those to whom the statute applies, to clearly indicate those to whom it applies, and to definitely provide that the failure to conform to that standard by those to whom it applies shall constitute a crime. The due process clause of the Fifth Amendment requires Congress to conform to the same principles in enacting federal penal laws.¹⁶ It is further required to do so by that provision of the Sixth Amendment which gives an accused person the right to be informed of the nature and cause of the accusation against him, since the absence of any reasonably definite standard prevents him from knowing in advance with what he is being charged.¹⁷ The due process clauses of state constitutions have also been construed to similarly limit state legislatures in defining crimes.¹⁸ The results that have been secured through the foregoing constructions of the indicated constitutional provisions are frequently obtained merely by treating legislation framed in vague and indefinite terms as not enacting any law whatever.

EX POST FACTO LAWS

317. The federal Constitution prohibits both the states and Congress from enacting ex post facto laws, and the constitution of each of the several states contains a similar limitation upon its legislative power.
318. The term "ex post facto law" has been defined to include any law (a) which makes an act a crime which was not such at the time when it was done, (b) which aggravates a crime or makes it a greater crime than it was when committed, (c) which changes the punishment for a crime by inflicting a greater punishment than the law annexed to it when committed, or (d) which alters the legal rules of procedure or evidence to the substantial disadvantage of those accused of crime.

¹⁵ State v. A. H. Read Co., 33 Wyo. 387, 240 P. 208.

¹⁶ UNITED STATES v. L. COHEN GROCERY CO., 255 U.S. 81, 41 S. Ct. 298, 65 L.Ed. 516, 14 A.L.R. 1045, Black's Cas. Constitutional Law, 2d, 652.

¹⁷ UNITED STATES v. L. COHEN GROCERY CO., 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516, 14 A.L.R. 1045, Black's Cas. Constitutional Law, 2d, 652.

¹⁸ State v. A. H. Read Co., 33 Wyo. 387, 240 P. 208.

General Considerations

The power of a state to define what shall constitute a crime is limited in important respects by the ex post facto clause of Section 10 of Article 1 of the federal Constitution and by a similar clause contained in its own constitution. The power of Congress to define crimes is similarly limited by the ex post facto clause of Section 9 of Article 1 of the federal Constitution. These several clauses are a limit only upon the legislative power of the particular government to which they respectively apply. Hence they do not invalidate changes of decision by courts in criminal cases even where these operate retroactively.¹⁹ They apply, however, to every form of legislative action whether it consist of a statute or municipal ordinance.²⁰ The federal constitutional provision prohibiting a state from passing ex post facto laws would also limit it in making or amending its state constitution since those constitute law making.²¹ It is also universally held that these various ex post facto clauses apply only to penal legislation and impose no limit upon the powers of the states and the federal government in the enactment of civil retrospective legislation.²² The most important aspect of these clauses is that they limit legislative bodies in defining crimes. This is not, however, their only function since they also limit legislative bodies in formulating rules of evidence and procedure in criminal proceedings. It should be noted that a law that is ex post facto as applied to acts done before its enactment is not wholly void, but may validly be applied to acts done subsequent to the date when it becomes effective as law.²³

Defining Crimes

The various ex post facto clauses impose no limit whatever upon a legislature's power to attach legal consequences to conduct occurring after a law becomes effective. They merely prevent attaching certain types of legal consequences to conduct occurring prior thereto. A statute may become effective either

¹⁹ *Ross v. State of Oregon*, 227 U. S. 150, 33 S.Ct. 220, 57 L.Ed. 458, Ann. Cas.1914C, 224.

²⁰ *Ross v. State of Oregon*, 227 U. S. 150, 33 S.Ct. 220, 57 L.Ed. 458, Ann. Cas.1914C, 224.

²¹ *Ross v. State of Oregon*, 227 U. S. 150, 33 S.Ct. 220, 57 L.Ed. 458, Ann. Cas.1914C, 224.

²² *CALDER v. BULL*, 3 Dall. 386, 1 L.Ed. 648, Black's Cas. Constitutional Law, 2d, 656; *State v. Taggart*, 186 Iowa 247, 172 N.W. 299.

²³ *Jaehne v. People of State of New York*, 128 U.S. 189, 9 S.Ct. 70, 32 L.Ed. 398.

upon its enactment or at some subsequent time. In the latter case the ex post facto clauses prevent its application not only to acts occurring prior to its enactment but also to those occurring during the interval between its enactment and the time that it becomes operative as law. The courts have frequently been compelled to determine whether the act which a given statute purported to punish was in fact a past act. The issue has generally arisen where the statute punished the continuation after its effective date of a relation or status created in whole or in part by acts occurring prior thereto, or punished subsequent acts in furtherance of or incidental to such relation or status. A statute of this character is almost universally held to punish not the acts occurring prior to its effective date but rather conduct occurring subsequent thereto, and, therefore, not to violate ex post facto clauses. It has, accordingly, been held that a statute disfranchising polygamists is not ex post facto as applied to prior plural marriages since the conduct that is punished is not the making of such marriages but continuing the status resulting therefrom after the statute had become operative.²⁴ A statute punishing the possession of intoxicating liquors is not invalid as an ex post facto law as applied to the possession of liquors lawfully acquired prior to its effective date since it is the continued possession thereafter that is made punishable.²⁵ Nor do ex post facto clauses prevent punishing the continued performance after such date of contracts made prior thereto where such statute made such subsequent conduct a crime.²⁶ A relation or status once created is not rendered immune by ex post facto clauses from having its incidents regulated by later legislation enforceable by punishing those who violate the regulatory provisions.

The ex post facto clauses prohibit legislation annexing present consequences to past acts only if those consequences consist of the infliction of punishment in excess of that incurred under the law in force when the act was done, or involve substantially disadvantageous procedural changes for those accused of crime. A law that permits any degree of punishment to be imposed with respect to past acts that were legally innocent when done is uni-

²⁴ *Murphy v. Ramsey*, 114 U.S. 15, 5 S.Ct. 747, 29 L.Ed. 47.

²⁵ *Samuels v. McCurdy*, 267 U.S. 188, 45 S.Ct. 264, 69 L.Ed. 563, 37 A.L.R. 1378.

²⁶ *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 17 S.Ct. 540, 41 L.Ed. 1007; *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 29 S.Ct. 220, 53 L.Ed. 417.

versally admitted to be an *ex post facto* law.²⁷ It is equally clear that one that increases the punishment beyond that incurred under the law as it existed when the act was done violates these constitutional safeguards. The principal difficulty in the application of these principles has been to determine whether the consequences annexed to the prior act by the subsequent statute amount to punishing its doer therefor. A statute that subjects a person to liability to capital punishment, imprisonment, or fine, for doing a given act clearly imposes a punishment thereon for purposes of determining whether its application to prior acts violates *ex post facto* clauses. It has been stated that punishment also includes depriving one of his civil or political rights.²⁸ A person's civil rights include that of pursuing the ordinary callings or professions subject to reasonable governmental regulations. A state may validly determine a person's present fitness for a given calling or profession, or for the exercise of his political rights, by taking account of his past conduct, whether that was innocent or criminal. It is not, however, permitted to use this power as an indirect means for punishing a prior innocent act by denying those who did it the privilege of exercising their civil or political rights,²⁹ nor may it increase the punishment for a prior crime by this device. If the character of the past act is such that it may fairly be said to indicate unfitness to presently pursue a calling or to exercise a political right, the denial of those rights under a statute enacted after said act was done is deemed a reasonable exercise of the state's power to regulate their exercise, and not to constitute the punishment of that past act in contravention of *ex post facto* clauses. A state statute requiring a license to practice medicine to be denied to those who had been convicted of abortion has, accordingly, been held not to violate the *ex post facto* clause as applied to a person whose conviction of that crime antedated the enactment of the statute.³⁰ If the character of the past act bears no reasonable relation to a person's competency presently to exercise the civil or political right denied

²⁷ *Ex parte Garland*, 4 Wall. 333, 18 L.Ed. 366.

²⁸ *Cummings v. Missouri*, 4 Wall. 277, 18 L.Ed. 356.

²⁹ *Ex parte Garland*, 4 Wall. 333, 18 L.Ed. 366; *Cummings v. Missouri*, 4 Wall. 277, 18 L.Ed. 356; *Pierce v. Carskadon*, 16 Wall. 234, 239, 21 L. Ed. 276.

³⁰ *HAWKER v. PEOPLE OF NEW YORK*, 170 U.S. 189, 18 S.Ct. 573, 42 L.Ed. 1002, *Black's Cas. Constitutional Law*, 2d, 665. See, also, *Mefert v. State Board of Medical Registration and Examination*, 66 Kan. 710, 72 P. 247, 1 L.R.A., N.S., 811 (revocation of physician's license for past immorality).

him by the subsequent statute, the denial is deemed punishment for said act and the statute held violative of ex post facto clauses. It was on that basis that a state law conditioning the right of a priest to pursue his calling upon his taking a test oath that he had not done certain acts prior to the enactment of that law was held to punish those prior acts and to be ex post facto,³¹ and that a similar federal statute requiring a test oath as a condition precedent to the right to practice law in the federal courts was held invalid as an ex post facto law.³² The cancellation of an alien's certificate of naturalization procured by his fraud is not deemed a punishment for that fraud, and a statute providing therefor is not ex post facto even as applied to a certificate procured prior to its enactment.³³ Nor is the deportation of an alien deemed punishment even though he is being deported for violating a criminal law, and hence a statute authorizing it is not ex post facto even though enacted subsequent to the doing of the acts that were made the basis for his deportation.³⁴ A statute that imposes a penalty for an act or omission is not necessarily a penal law. It is considered such where the primary purpose of the penalty is punishment.³⁵ But penalties imposed for tax delinquencies are frequently held to be imposed not by way of punishment but solely to protect the public revenues and thus to be outside the scope of ex post facto clauses.³⁶ The same principles have been applied for determining whether forfeitures can be retrospectively imposed consistently with the limitations of ex post facto clauses.³⁷

Changing the Punishment for Crimes

The classic enumeration of the various classes of ex post facto laws found in *Calder v. Bull*³⁸ includes not only retrospective laws

³¹ *Cummings v. Missouri*, 4 Wall. 277, 18 L.Ed. 356.

260 U.S. 647, 43 S.Ct. 233, 67 L.Ed. 439.

³² *Ex parte Garland*, 4 Wall. 333, 18 L.Ed. 366.

³⁷ *United States v. Hughes*, 26 Fed. Cas., p. 414, No.15,416; *Kentucky Union Co. v. Commonwealth of Kentucky*, 219 U.S. 140, 31 S.Ct. 171, 55 L.Ed. 137. For a discussion of the factors considered in determining whether a penalty or forfeiture is imposed as punishment or for some other purpose, see *Helvering v. Mitchell*, 303 U.S. 391, 58 S.Ct. 630, 82 L. Ed. 917.

³³ *Johannessen v. United States*, 225 U.S. 227, 32 S.Ct. 613, 56 L.Ed. 1066.

³⁴ *Bugajewitz v. Adams*, 228 U.S. 585, 33 S.Ct. 607, 57 L.Ed. 978.

³⁵ *Burgess v. Salmon*, 97 U.S. 381, 24 L.Ed. 1104.

³⁶ *Bankers' Trust Co. v. Blodgett*,

383 Dall. 386, 1 L.Ed. 648.

that make that criminal which was innocent when done, but also those that increase the punishment annexed to prior criminal conduct and those that aggravate the degree of a crime. The propriety of including these classes has been universally recognized. The principal problem has been to determine whether a subsequent change in punishment involves an increase thereof since changes that involve no increase are not prohibited by ex post facto clauses.³⁹ The applicable rule is that a law changing the punishment after the commission of a crime is ex post facto if it requires any penalty that may be more severe than the least one that could be imposed under the old law, or if it permits a penalty more severe than the heaviest one authorized by the old law.⁴⁰ It has, accordingly, been held that a subsequent statute requiring the court to impose the maximum sentence provided for the crime is ex post facto where the law in force at the time of its omission permitted a lesser sentence, since the later act made mandatory what before was a permissive maximum.⁴¹ It is immaterial that the actual sentence under the former law might have been the same as that required by the later law since the ex post facto clauses look to the standard of punishment prescribed by a statute rather than to the sentences actually imposed and forbid an increase in the possible penalty. A statute of that character is not saved by a provision authorizing a board to later fix the actual duration of the prisoner's confinement. It is seldom difficult to determine whether a change imposes a more onerous punishment where it involves only a change in the amount of punishment without affecting its character.⁴² It is often difficult to determine this issue where the change is in the character of the punishment as by substituting life imprisonment for the death penalty or fines for imprisonment. If the change is one which a reasonable person would regard as a mitigation of punishment, the change is not deemed ex post facto as applied to prior crimes. A change from the death penalty to imprisonment even for life is generally held to involve a reduction rather than an increase in punishment,⁴³ as is one substituting

³⁹ *People v. Hayes*, 140 N.Y. 484, 35 N.E. 951, 23 L.R.A. 830, 37 Am.St. Rep. 572.

⁴⁰ *Flaherty v. Thomas*, 12 Allen, Mass., 428; *In re Lambrecht*, 137 Mich. 450, 100 N.W. 606.

⁴¹ *Lindsey v. State of Washington*, 301 U.S. 397, 57 S.Ct. 797, 81 L.Ed. 1182.

⁴² *Rooney v. State of North Dakota*, 196 U.S. 319, 25 S.Ct. 264, 49 L.Ed. 494, 3 Ann.Cas. 76, where, however, the possible increase was in the length of confinement preliminary to carrying out of a death sentence.

⁴³ *Commonwealth v. Wyman*, 12 Cush., Mass., 237, 239; *McGuire v. State*, 76 Miss. 504, 25 So. 495. *Contra*, *Shepherd v. People*, 25 N.Y. 406.

imprisonment for whipping.⁴⁴ A mere change in the place of confinement not involving any change in its character involves no increase in punishment, but one substituting solitary for merely ordinary confinement would undoubtedly be *ex post facto* as applied to prior crimes.⁴⁵ A statute whose only substantial effect is to extend the period before a death sentence can be carried out may validly be applied to crimes committed before its enactment,⁴⁶ but one that requires solitary confinement during such period when that was not required by the law in force when the crime was committed, and which also increases the prisoner's uncertainty as to the time of his execution has been held *ex post facto* as applied to past crimes.⁴⁷ A mere change in the place for executing a death sentence,⁴⁸ or one substituting death by electrocution for death by hanging,⁴⁹ may validly be applied to past crimes. A change which deprives one of an advantage accorded him by the law in force when the crime was committed violates *ex post facto* clauses. It is, accordingly, invalid to apply to a past crime a statute that places a prisoner, who has been discharged after serving his maximum sentence as reduced on account of good behavior, on parole for the balance of his maximum term where the law in force when he committed the crime provided for his unconditional discharge after serving his maximum term less time-off for good behavior.⁵⁰ The same principle applies to other retrospective changes that in effect involve increases in punishment through depriving prisoners of advantages conferred by the law in force when they committed the crime.⁵¹ The validity of statutes providing for indeterminate sentences has generally been sustained as against the objection that they were *ex post facto* as applied to past offenses.⁵² The changes produced

⁴⁴ *Strong v. State*, 1 Blackf., Ind., 193.

⁴⁵ *Rooney v. State of North Dakota*, 196 U.S. 319, 25 S.Ct. 264, 49 L.Ed. 494, 3 Ann.Cas. 76; *Hartung v. People*, 22 N.Y. 95; *Ex parte Medley*, 134 U.S. 160, 10 S.Ct. 384, 33 L.Ed. 835.

⁴⁶ *Rooney v. State of North Dakota*, 196 U.S. 319, 25 S.Ct. 264, 49 L.Ed. 494, 3 Ann.Cas. 76.

⁴⁷ *Ex parte Medley*, 134 U.S. 160, 10 S.Ct. 384, 33 L.Ed. 835; *In re Petty*, 22 Kan. 477.

⁴⁸ *Rooney v. State of North Dakota*, 196 U.S. 319, 25 S.Ct. 264, 49 L.Ed. 494, 3 Ann.Cas. 76.

⁴⁹ *Malloy v. State of South Carolina*, 237 U.S. 180, 35 S.Ct. 507, 59 L.Ed. 905; *Ex parte Johnson*, 96 Tex.Cr.R. 473, 258 S.W. 473.

⁵⁰ *People of United States ex rel. Umbenhowar v. McDonnell*, D.C., 11 F.Supp. 1014.

⁵¹ *State ex rel. Woodward v. Board of Parole*, 155 La. 699, 99 So. 534.

⁵² *Davis v. State*, 152 Ind. 34, 51 N.E. 928, 71 Am.St.Rep. 322; *Murphy*

by them must, however, meet the test found in the general rule stated near the beginning of this paragraph. A statute that imposes heavier penalties upon those previously convicted of other crimes, or upon habitual criminals, is not *ex post facto* even though enacted subsequent to the commission of the crimes the commission of which affords the basis for the infliction of the heavier penalties imposed by it.⁵³ The additional penalty is not punishment for those prior offenses but for the offense committed subsequent to the enactment of such statute. The commission of the prior crimes is deemed a reasonable factor to be considered in defining the punishment for that subsequent offense. A change in punishment that is in good faith referable to prison discipline as its primary object is valid, even though more onerous.⁵⁴ The date as of which the subsequent statute becomes effective rather than that of its enactment determines whether it is being given a retrospective operation in a given case.⁵⁵ It should also be noted that whether a person who has been illegally sentenced under a law *ex post facto* as to him can be sentenced at all under some other law is for the exclusive determination by the government, state or federal, by which the sentence was imposed.⁵⁶

Extinguishing Immunity from Prosecution for Crime

A person who has committed a crime may be relieved of guilt and liability to punishment by virtue of an exercise of the pardoning power or by amnesty legislation. The legislature may not interfere with the executive's pardon power, and legislation seeking to punish one who has been pardoned for the crime with respect to which he received a pardon is unconstitutional on that score apart from any question of whether such legislation is *ex post facto*.⁵⁷ The repeal of amnesty legislation is not, however,

v. Commonwealth, 172 Mass. 264, 52 N.E. 505, 43 L.R.A. 154, 70 Am.St. Rep. 266.

⁵³ McDonald v. Commonwealth of Massachusetts, 180 U.S. 311, 21 S.Ct. 389, 45 L.Ed. 542; State v. Zywicki, 175 Minn. 508, 221 N.W. 900; Taylor v. State, 114 Neb. 257, 207 N.W. 207; State v. Dowden, 137 Iowa 573, 115 N.W. 211; Armstrong v. Commonwealth, 177 Ky. 690, 198 S.W. 24; State v. LePitre, 54 Wash. 166, 103 P. 27, 18 Ann.Cas. 922.

⁵⁴ Hartung v. People, 22 N.Y. 95 (dictum).

⁵⁵ Ex parte Medley, 134 U.S. 160, 10 S.Ct. 384, 33 L.Ed. 835.

⁵⁶ Lindsey v. State of Washington, 301 U.S. 397, 57 S.Ct. 797, 81 L.Ed. 1182.

⁵⁷ Ex parte Garland, 4 Wall. 333, 18 L.Ed. 366.

an interference with the executive's power to pardon. Its repeal would, if valid, subject one to whom the amnesty legislation had applied to a punishment against which it had rendered him immune. It would not, however, subject him to any punishment to which he was not liable at the time he committed the crime. It has, nevertheless, been held that the repeal of an amnesty law violates the ex post facto clauses so far as it revives a liability to punishment in the case of those who had been relieved therefrom by the original amnesty legislation.⁵⁸ The same ultimate theory of fairness and justice underlies the decision that a statute which extends the period of the statute of limitations against prosecution for a crime is an invalid ex post facto law as applied to a crime against which the previous statute had already run.⁵⁹ It is not, however, a violation of ex post facto clauses to apply such statute to crimes the prosecution of which had not been barred at the time it became effective.⁶⁰ It is generally held that the repeal of a criminal statute without a proper saving clause prevents the subsequent prosecution and punishment for violations occurring before its repeal because of the absence of any legal basis therefor. It has been intimated that a subsequent statute providing for prosecutions in such cases would not be ex post facto if the punishment therefor were no greater than that provided by the original statute.⁶¹ The suggested principle is sound. The analogies afforded by amnesty laws and statutes of limitation are inapplicable.

Procedural Changes

An accused has no vested right in any particular rule of procedure or evidence, and changes therein may validly be applied to prior crimes unless their effect is to deprive an accused of some substantial right given him by the law in force when his offense was committed. It cannot be denied that rules of procedure and evidence affect the amount of an accused's protection, and that changes therein inevitably affect its degree. There are certain protective devices that are considered fundamental, and the right to retain them is deemed fundamental. There is no single test for determining which of the rules of procedure and evidence are of that character.⁶² The decided cases give but a partial clue

⁵⁸ *State v. Keith*, 63 N.C. 140.

F.2d 420; *Commonwealth v. Duffy*, 96 Pa. 506, 42 Am.Rep. 554.

⁵⁹ *Moore v. State*, 43 N.J.L. 203, 39 Am.Rep. 558.

⁶¹ See *State v. Daley*, 29 Conn. 272.

⁶⁰ *Falter v. United States*, 2 Cir., 23

⁶² *Beazell v. State of Ohio*, 269 U.S. 167, 46 S.Ct. 68, 70 L.Ed. 216.

as to what procedural changes affect an accused's substantial rights so disadvantageously as to be incapable of application to the commencement of prosecutions for, and the trial of, prior offenses. The commencement of prosecutions by indictment is not such a fundamental procedural protection for an accused as to prevent legislative changes therein to be applied to offenses committed before the change, and a statute permitting them to be commenced by either indictment or information instead of by the former method only may be validly applied to past as well as future offenses.⁶³ An accused has no right to be tried in the court in which he would have been tried under the law in force at the time when he committed his offense, and a statute giving certain courts jurisdiction to try specified offenses previously triable only in certain other courts is not *ex post facto* as applied to prior offenses.⁶⁴ The application to prior crimes of a statute changing the place of trial does not violate *ex post facto* clauses.⁶⁵ The right of appeal existing under the law in force when the offense was committed may be not only greatly changed as by substituting an appeal to a division of the supreme court for one to the entire court,⁶⁶ but may even be completely abolished.⁶⁷ And a statute conferring a right of appeal upon the state, where none existed before, may validly be applied to prior crimes.⁶⁸ The right to a jury trial is, however, deemed a fundamental right of an accused. If the law in force when the offense was committed required a unanimous verdict by a jury of twelve for conviction, a subsequent law permitting conviction by the unanimous verdict of a jury of less than twelve is *ex post facto* as applied to that offense.⁶⁹ The same decision has been reached where the change consisted of substituting conviction by a stated majority of a jury of twelve for conviction by a unanimous jury of that number.⁷⁰ The qualifications of jurors may, however, be changed

⁶³ *State v. Kyle*, 166 Mo. 287, 65 S.W. 763, 56 L.R.A. 115; *Lybarger v. State*, 2 Wash. 552, 27 P. 449, 1029.

⁶⁴ *State v. Welch*, 65 Vt. 50, 25 A. 900. See, also, *Commonwealth v. Phelps*, 210 Mass. 78, 96 N.E. 349, 37 L.R.A., N.S., 567, Ann.Cas.1912C, 1119 (change in number of trial judges).

⁶⁵ *Gut v. Minnesota*, 9 Wall. 35, 19 L.Ed. 573.

⁶⁶ *Duncan v. State of Missouri*, 152 U.S. 377, 14 S.Ct. 570, 38 L.Ed. 485.

⁶⁷ *Ex parte McCardle*, 7 Wall. 506, 19 L.Ed. 264.

⁶⁸ *Mallett v. State of North Carolina*, 181 U.S. 589, 21 S.Ct. 730, 45 L.Ed. 1015.

⁶⁹ *Thompson v. Utah*, 170 U.S. 343, 18 S.Ct. 620, 42 L.Ed. 1061.

⁷⁰ *State v. Ardoin*, 51 La. Ann. 169, 24 So. 802, 72 Am.St.Rep. 454.

by legislation taking effect after the commission of an offense,⁷¹ and a statute reducing the number of peremptory challenges to jurors allowed defendants may also be validly applied to past crimes.⁷² The law governing the number of crimes that may be charged in a single indictment may be changed after their commission even though it involve a reduction in the number of peremptory challenges available to an accused below the number he would have had if he had been separately tried for each of the offenses consolidated in the single indictment.⁷³ A change in law abolishing the right of persons jointly indicted to separate trials on their demand thereof, and making the grant of such demand discretionary with the court, does not substantially prejudice an accused's right to a fair trial, and does not violate *ex post facto* clauses as applied to prior offenses.⁷⁴ Changes in the rules of evidence may be given retrospective operation to the trial of past offenses unless the change results in permitting conviction on less evidence than was required to support a conviction when the offenses were committed. Statutes enlarging the class of competent witnesses, as by removing the bar against those under judgment of conviction for a felony,⁷⁵ and those enlarging the class of admissible relevant evidence, as by removing the bar against the use of letters written by an accused to his wife,⁷⁶ do not change the quantum of proof required for conviction, and may accordingly be applied to the trial of prior offenses. The defenses available to an accused under the law in force when his offense was committed may not be taken from him by subsequent legislation. This occurs when a subsequent statute repeals a prior rule under which conviction of second degree murder operated as an acquittal of the charge of first degree murder.⁷⁷ A person who has been convicted does not, however, have a right to escape punishment because of some technical defect in his sentence. Hence a statute that permits the correction of errors in a sentence may be validly applied to prior offenses committed when the law provided that an erroneous sentence entitled the defend-

⁷¹ *Gibson v. Mississippi*, 162 U.S. 565, 16 S.Ct. 904, 40 L.Ed. 1075.

⁷² *South v. State*, 86 Ala. 617, 6 So. 52; *State v. Duestrow*, 137 Mo. 44, 38 S.W. 554, 39 S.W. 266.

⁷³ *People ex rel. Pincus v. Adams*, 274 N.Y. 447, 9 N.E.2d 46.

⁷⁴ *Beazell v. Ohio*, 269 U.S. 167, 46 S.Ct. 68, 70 L.Ed. 216.

⁷⁵ *Hopt v. Utah*, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262.

⁷⁶ *THOMPSON v. MISSOURI*, 171 U.S. 380, 18 S.Ct. 922, 43 L.Ed. 204, *Black's Cas. Constitutional Law*, 2d, 660.

⁷⁷ *Kring v. Missouri*, 107 U.S. 221, 2 S.Ct. 443, 27 L.Ed. 506.

ant to a discharge.⁷⁸ The foregoing decisions give a fairly clear indication of what are considered the fundamental procedural protections accorded an accused. They have been determined more on the basis of historical and traditional than logical factors. It should be noted that they are not identical with those deemed so fundamental as to be protected by due process clauses, but include some not protected by the latter provisions. The reason for the differences is that due process clauses require only that a trial be fair while *ex post facto* clauses are intended to protect an accused against unfair retroactive changes in rules.

COMMENCEMENT OF CRIMINAL PROCEEDINGS

319. The Fifth Amendment to the federal Constitution provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger." A provision of the same tenor is found in the constitutions of most of the several states although the scope of some of them includes all criminal offenses.
320. The Sixth Amendment to the federal Constitution provides that in all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation. The constitutions of most of the states contain a similar provision.

Federal Prosecutions

The provision of the Fifth Amendment set forth above applies only to the commencement of prosecutions by or under the authority of the United States. It does not, however, apply to all prosecutions of the character referred to and brought by or under its authority. It has no extraterritorial effect and hence Congress may authorize the commencement of prosecutions for such crimes in consular courts established in foreign countries in pursuance of a treaty by complaint or information.⁷⁹ The provision would, however, apply to the trial of a person within the United States for a crime committed outside it.⁸⁰ It has also

⁷⁸ *Ratzky v. People*, 29 N.Y. 124.

⁸⁰ *In re Ross*, 140 U.S. 453, 11 S.Ct. 897, 35 L.Ed. 581.

⁷⁹ *In re Ross*, 140 U.S. 453, 11 S.Ct. 897, 35 L.Ed. 581.

been held that the provision would not apply to the commencement of prosecutions for the specified classes of crimes within an unincorporated territory of the United States.⁸¹ The provision itself except cases "arising within the land or naval forces, or in the militia, when in actual service in time of war or public danger." It has been decided that the language "when in actual service in time of war or public danger" qualifies only the word "militia", and that persons in the regular land or naval forces may be tried by a court martial for such crimes while they continue to be members of such forces.⁸²

This provision of the Fifth Amendment reflects the importance attached to the grand jury as a safeguard against governmental oppression. The realization of that objective requires that the grand jury be fairly drawn and be impartial. It has, however, been held that an accused's rights in that respect are not violated because the grand jury which indicted him, a Socialist, was composed exclusively of persons belonging to other political parties and of property owners.⁸³ The provision is concerned with matters of substance rather than of form. It does not demand that the grand jury as a body deliver the indictment to the court, but delivery by the foreman even in the absence of all other members has been held valid.⁸⁴ The principal question that has arisen in construing this provision has been what constitute "infamous crimes." The test is not the punishment actually imposed in a given case but that which may be imposed under the statute providing therefor.⁸⁵ The fact that the statute describes the offense as a misdemeanor does not prevent it from being held an infamous crime within this constitutional provision since Congress is powerless to conclusively determine the scope of a constitutional limitation upon its power.⁸⁶ It is universally held that an offense punishable by imprisonment in a prison or penitentiary with hard labor is an infamous crime,⁸⁷ and that it is such even

⁸¹ *Hawaii v. Mankichi*, 190 U.S. 197, 23 S.Ct. 787, 47 L.Ed. 1016.

⁸² *Johnson v. Sayre*, 158 U.S. 109, 15 S.Ct. 773, 39 L.Ed. 914.

⁸³ *Ruthenberg v. United States*, 245 U.S. 480, 38 S.Ct. 168, 62 L.Ed. 414.

⁸⁴ *Breese v. United States*, 226 U.S. 1, 33 S.Ct. 1, 57 L.Ed. 97.

⁸⁵ *Ex parte Wilson*, 114 U.S. 417,

5 S.Ct. 935, 29 L.Ed. 89; *Fitzpatrick v. United States*, 178 U.S. 304, 20 S.Ct. 944, 44 L.Ed. 1078.

⁸⁶ *UNITED STATES v. MORELAND*, 258 U.S. 433, 42 S.Ct. 368, 66 L.Ed. 700, 24 A.L.R. 992, *Black's Cas. Constitutional Law*, 2d, 668.

⁸⁷ *Ex parte Wilson*, 114 U.S. 417, 5 S.Ct. 935, 29 L.Ed. 89; *Wong Wing v. United States*, 163 U.S. 228, 16 S.Ct. 977, 41 L.Ed. 140.

though the imprisonment be without hard labor.⁸⁸ It was finally decided that an offense constitutes an infamous crime if punishable by imprisonment with hard labor irrespective of whether the place of imprisonment be a prison or a merely corrective institution such as some so-called workhouses.⁸⁹ The Court took the position that the character of the punishment rather than that of the place of imprisonment is determinative. The foregoing decisions must not be construed as exhausting the scope of infamous crimes. The Court has at times quoted with approval definitions enumerating other types of punishment which would render an offense an infamous crime,⁹⁰ and intimated that it would be such if punishable by a disqualification to hold political office.⁹¹ It has also intimated that what punishments are to be considered as infamous may be affected by changes of public opinion from one age to another.⁹² This is sound and gives the provision a desirable degree of flexibility. It should be noted that aliens are as much protected by this constitutional provision as are citizens.⁹³

A provision of the Sixth Amendment confers upon the accused in all criminal prosecutions the right to be informed of the nature and cause of the accusation against him. The purpose of this provision is to enable an accused to learn in advance of the trial and with reasonable certainty with what he is being charged in order that he may prepare his defense against it, and plead the judgment in bar to any subsequent prosecution for the same offense.⁹⁴ It provides a constitutional standard for a valid indictment, complaint or information. The test of their sufficiency is implicit in the objective aimed at by this provision. Similar state constitutional provisions have been held not to prevent a state from prescribing simplified forms of indictment to be used in its courts, but an indictment molded on such statutory form must contain all the allegations needed to give it certainty and to charge an offense.⁹⁵ It has, however, been held that a statute

⁸⁸ *Mackin v. United States*, 117 U. S. 348, 6 S.Ct. 777, 29 L.Ed. 909.

⁸⁹ *UNITED STATES v. MORELAND*, 258 U.S. 433, 42 S.Ct. 368, 66 L.Ed. 700, 24 A.L.R. 992, *Black's Cas. Constitutional Law*, 2d, 668.

⁹⁰ See *Ex parte Wilson*, 114 U.S. 417, 5 S.Ct. 935, 29 L.Ed. 89.

⁹¹ *United States v. Waddell*, 112 U.S. 76, 5 S.Ct. 35, 28 L.Ed. 673.

⁹² *Ex parte Wilson*, 114 U.S. 417, 5 S.Ct. 935, 29 L.Ed. 89.

⁹³ *Wong Wing v. United States*, 163 U.S. 228, 16 S.Ct. 977, 41 L.Ed. 140.

⁹⁴ See *United States v. Simmons*, 96 U.S. 360, 24 L.Ed. 819.

⁹⁵ *Commonwealth v. Jordan*, 207 Mass. 259, 93 N.E. 809, 69 A.L.R. 1378.

providing for a short form indictment, which the court stated would have been insufficient by prior tests, was not violative of such a constitutional clause where the statute by a provision for a compulsory bill of particulars assured the accused of being informed of the nature and cause of the accusation against him and of being able sufficiently to identify the offense to protect him against being put in jeopardy more than once.⁹⁶

Prosecutions by a State

Neither the due process clause of the Fourteenth Amendment, nor any other provision of the federal Constitution, require a state to commence any of its criminal prosecutions by indictment by a grand jury.⁹⁷ There is no doubt but that said due process clause would require an accused to be informed of the nature and cause of the accusation against him since that is a fundamental condition to the fair hearing to which he is entitled by due process.⁹⁸ If, however, a state requires criminal prosecutions to be instituted by indictment by a grand jury, it must operate that machinery without unreasonable discrimination. It had been held that the systematic and arbitrary exclusion of negroes from the lists from which the grand jurors were selected solely because of their race or color denies equal protection to a negro indicted by a grand jury so chosen.⁹⁹ A state court has rendered a similar decision in holding void an indictment of a Catholic by a grand jury from which Catholics had been systematically and arbitrarily excluded on account of their religion.¹ A conviction in proceedings thus instituted can be set aside if the person who has been convicted is a member of the group that has been thus discriminated against in the selection of the grand jury. It is certain that the constitutional rights of others not belonging to that class will be held not to have been violated by such proceedings. Apart from the few limitations last discussed, the constitution of a state determines the methods for instituting criminal proceedings by it or under its authority. The similarity of the language in which the provisions of the constitutions of most of the states are phrased to that of the similar provisions of the federal Con-

⁹⁶ *People v. Bogdanoff*, 254 N.Y. 16, 171 N.E. 890.

⁹⁹ *Hale v. Com. of Kentucky*, 303 U.S. 613, 58 S.Ct. 753, 82 L.Ed. 1050.

⁹⁷ *Hurtado v. California*, 110 U.S. 516, 4 S.Ct. 111, 292, 28 L.Ed. 232.

¹ *Jaurez v. State*, 102 Tex.Cr.R. 297, 277 S.W. 1091.

⁹⁸ *Hurtado v. California*, 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232.

stitution renders their discussion unnecessary in a brief text. It suffices to state that nothing in the federal Constitution prevents a state from construing its own provisions in a different manner than that in which federal courts have construed similar federal constitutional provisions limiting the federal government, provided only that the state court's constructions do not deny a fair trial and the requisite equality of treatment.

BAIL

321. The Eighth Amendment to the federal Constitution provides that "excessive bail shall not be required." The constitutions of many of the states contain a similar provision.

The object of bail is to enable persons charged with criminal offenses to regain their liberty, and at the same time to secure their attendance when they are wanted for trial. The purpose of constitutional provisions against requiring excessive bail is to protect that interest of an accused, but only so far as it can be done without defeating the public interest in enforcing the criminal law by insuring that he will be brought to trial. The provision of the Eighth Amendment applies to the federal government only. It has never yet been authoritatively held that any provision of the federal Constitution requires a state either to permit an accused to give bail or to limit it to requiring only reasonable bail. The prohibition against requiring unreasonable bail does not mean that bail may not be completely denied where that is necessary for protecting the public interest. Some state constitutional provisions, however, confer a right to bail with stated exceptions.² The Eighth Amendment has received very little judicial construction, but it permits a consideration, in fixing the amount of bail, not only of the financial position of the accused but also of the atrocity of the offense with which he is charged and the likelihood of its abuse if granted.³ The grant or refusal of bail, and fixing its amount, are uniformly held to lie within the discretion of the committing magistrate or trial court.

² See *Ex parte McDaniel*, 86 Fla. 145, 97 So. 317; *People v. Tinder*, 19 Cal. 539, 31 Am.Dec. 77.

³ See *United States v. Lawrence*, Fed.Cas.No.15,577; *U. S. v. Brawnner*, D.C., 7 F. 86; *Barrett v. United States*, 6 Cir., 4 F.2d 317.

PLACE OF TRIAL

322. Section 2 of Article 3 of the federal Constitution provides that the trial of all crimes, except in cases of impeachment, "shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed." The Sixth Amendment accords an accused, in all criminal prosecutions, the right to a trial "by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

The foregoing provisions of the Constitution apply only to the trial of federal offenses in the federal courts.⁴ The case of impeachments is expressly excepted from the former provision, and the purposes of the Sixth Amendment in which the latter provision is found indicate that it too is inapplicable to the trial of impeachments. The former of them expressly classifies federal crimes into those committed within a state and those not committed within a state. It requires those committed within a state to be tried within that state. This is undoubtedly a limit on the power of Congress to define the place within which a crime shall be deemed to have been committed. It may, however, provide that a crime partly committed in one state and partly in another may be tried in either,⁵ and that a continuing offense, such as the interstate carriage of goods in violation of federal law, may be tried in any state in which any part of their transportation occurred.⁶ The place of trial of an offense committed within a state is further subject to the limitation imposed by the Sixth Amendment that it be had in the district in which the offense was committed, and that that district must have been fixed by a law that took effect prior to its commission. The principles applicable in determining the state within which a crime may be validly deemed to have been committed apply in determining the district of its commission.⁷ A statute providing for the assignment of a federal judge of one district to another district for the trial of crimes in the latter does not involve the creation of a new dis-

⁴ *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U.S. 96, 9 S.Ct. 28, 32 L.Ed. 352.

⁶ *Armour Packing Co. v. United States*, 209 U.S. 56, 28 S.Ct. 428, 52 L.Ed. 681.

⁵ *Burton v. United States*, 202 U.S. 344, 26 S.Ct. 688, 50 L.Ed. 1057, 6 Lnn.Cas. 362.

⁷ *Re Palliser*, 136 U.S. 257, 10 S. Ct. 1034, 34 L.Ed. 514.

trict, and may be applied in the trial of offenses committed prior to its taking effect.⁸ The place of trial of federal offenses not committed within a state lies within the exclusive determination of Congress. The provision of the Sixth Amendment requiring the district of trial to be previously ascertained by law does not apply to crimes not committed within a state.⁹ Neither the provisions of Article 3 nor those of the Sixth Amendment confer upon an accused the right to be tried in the state or district of his residence.¹⁰ A violation of any of the foregoing constitutional requirements prevents the court from acquiring jurisdiction to try the case. There exist no authoritative decisions on whether the due process clause of the Fourteenth Amendment limits a state in fixing the place for the trial of those charged with crime, but it is probable that it does. The same statements apply to the effect of the equal protection clause of that Amendment upon this matter.¹¹

TRIAL BY JURY

323. Section 2 of Article 3 of the federal Constitution provides that "the trial of all crimes, except in the case of impeachment, shall be by jury." The Sixth Amendment confers upon the accused, in all criminal prosecutions, "the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

324. The constitutions of the several states also protect the right of an accused to a jury trial, but the precise extent to which it is protected depends upon the language of the various constitutional provisions which vary from state to state. The right to a jury trial in state criminal trials has never yet been held to be required by any provision of the federal Constitution.

⁸ *Lamar v. United States*, 241 U.S. 103, 36 S.Ct. 535, 60 L.Ed. 912.

⁹ *United States v. Dawson*, 15 How. 467, 14 L.Ed. 775; *Jones v. United States*, 137 U.S. 202, 11 S.Ct. 80, 34 L.Ed. 691; *Cook v. United States*, 138 U.S. 157, 11 S.Ct. 268, 34 L.Ed. 906.

¹⁰ *Burton v. United States*, 202 U.S.

344, 26 S.Ct. 688, 50 L.Ed. 1057, 6 Ann.Cas. 362; *Haas v. Henkel*, 216 U.S. 462, 30 S.Ct. 249, 54 L.Ed. 569, 17 Ann.Cas. 1112.

¹¹ That the equal protection clause limits a state in prescribing the venue of civil suits, see *Power Mfg. Co. v. Saunders*, 274 U.S. 490, 47 S.Ct. 678, 71 L.Ed. 1165.

325. The federal Constitution forbids both Congress¹² and the states¹³ from passing bills of attainder.

Trial by Jury

The provisions of the federal Constitution expressly relating to the trial of crimes by a jury apply only to their trial by or under the authority of the United States. They do not apply to a state, nor to a foreign country, and an Act of Congress authorizing an American citizen to be extradited to a foreign country for trial there does not violate them merely because the trial therein will not be by jury.¹⁴ They do, however, apply to trials in the District of Columbia¹⁵ and by or under the authority of an incorporated territory of the United States,¹⁶ but not to the trial of crimes in unincorporated federal territory,¹⁷ nor in consular courts established by the United States in foreign countries.¹⁸ The scope of the right protected by these provisions is to be determined by reference to the meanings of "jury" and "trial by jury" affixed to them in the law of England and the states at the time of the adoption of the Constitution.¹⁹ It has, accordingly, been held to include all the essential elements recognized by those laws at that time, and thus to mean a trial by a jury of twelve persons, in the presence and under the superintendence of a judge empowered to instruct them as to the law and advise them as to the facts, whose verdict is required to be unanimous.²⁰ These essentials are beyond legislative destruction or impairment. The Sixth Amendment expressly requires the jury to be an impartial one, and, while this would undoubtedly prevent any legislation that prevented an accused from challenging jurors for causes going to their fairness and impartiality, it does not prevent Congress from excluding as

¹² U.S.C.A.Const. Article 1, Section 9, Clause 3.

¹³ U.S.C.A.Const. Article 1, Section 10, Clause 1.

¹⁴ *Neely v. Henkel*, 180 U.S. 109, 21 S.Ct. 302, 45 L.Ed. 448.

¹⁵ *Callan v. Wilson*, 127 U.S. 540, 8 S.Ct. 1301, 32 L.Ed. 223.

¹⁶ *Thompson v. Utah*, 170 U.S. 343, 18 S.Ct. 620, 42 L.Ed. 1061; *Rasmussen v. United States*, 197 U.S. 516, 25 S.Ct. 514, 49 L.Ed. 862.

¹⁷ *Dorr v. United States*, 195 U.S. 138, 24 S.Ct. 808, 49 L.Ed. 128, 1 Ann.Cas. 697; *Balzac v. People of Porto Rico*, 258 U.S. 298, 42 S.Ct. 343, 66 L.Ed. 627.

¹⁸ *In re Ross*, 140 U.S. 453, 11 S.Ct. 897, 35 L.Ed. 581.

¹⁹ *Thompson v. Utah*, 170 U.S. 343, 18 S.Ct. 620, 42 L.Ed. 1061.

²⁰ *PATTON v. UNITED STATES*, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854, 70 A.L.R. 263, *Black's Cas. Constitutional Law*, 2d, 674.

grounds for challenges causes that do not go to those matters. A statute making certain classes of federal government employees and pensioners eligible for jury duty has, accordingly, been held not to violate the requirement for an impartial jury.²¹ The Court clearly stated that it would have reached the same decision even if such persons had been ineligible under common law rules, and thus reduced the importance of a mere appeal to history in developing the meaning of these constitutional guaranties. It has been stated that there is nothing in the federal Constitution requiring Congress to grant peremptory challenges in criminal cases, and that, therefore, a statute requiring the several defendants in a single trial to be treated as a single party for purposes of determining the number of allowable peremptory challenges does not violate the constitutional provisions protecting the right to a jury trial.²² The right to an impartial jury does not require that the jury contain members belonging to a particular group to which an accused belongs, and so it has been held that a Socialist is not denied this constitutional right because the trial jury was wholly composed of members of other parties and of property owners.²³ The systematic and arbitrary exclusion of Socialists solely because they were such would undoubtedly violate an accused Socialist's rights, and, in the case of a trial in a state court, it would deny his rights under the equal protection clause of the Fourteenth Amendment.²⁴ The same principles would apply to similar discriminations based on other grounds. State constitutional provisions preserving the right of trial by jury have also been construed so as to preserve it as it existed when the respective constitutions were adopted. State decisions construing them have paralleled those of federal courts construing federal con-

²¹ *United States v. Wood*, 299 U.S. 123, 57 S.Ct. 177, 81 L.Ed. 78.

²² *Stilson v. United States*, 250 U.S. 583, 40 S.Ct. 28, 63 L.Ed. 1154; cf. language in *Lewis v. United States*, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011.

²³ *Ruthenberg v. United States*, 245 U.S. 480, 38 S.Ct. 168, 62 L.Ed. 414. The equal protection clause of the Fourteenth Amendment, U.S.C.A. Const., does not require that any part of a jury trying a negro, or a Japanese, shall consist of negroes, or

Japanese; *Wood v. Brush*, 140 U.S. 278, 11 S.Ct. 738, 35 L.Ed. 505; *Jugiro v. Brush*, 140 U.S. 686, 11 S.Ct. 1022, 35 L.Ed. 749. Nor does it deny an accused due process to exclude certain classes, such as lawyers, doctors and ministers, from service on either grand or petit juries; *Rawlins v. State of Georgia*, 201 U.S. 638, 26 S.Ct. 560, 50 L.Ed. 899, 5 Ann.Cas. 783.

²⁴ *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664; *Martin v. Texas*, 200 U.S. 316, 26 S.Ct. 338, 50 L.Ed. 497.

stitutional provisions guaranteeing trial by jury.²⁵ The Sixth Amendment requires the jury to be drawn from the vicinage of the crime, but as indicated in discussing the place of trial, this does not apply where the crime was committed outside of a state. State constitutional provisions are also construed to require trial by a jury drawn from the vicinage of the crime.²⁶ The federal constitutional provisions governing trials in federal courts have been held not to be satisfied by according a jury trial in an appellate court after a conviction in a trial without a jury in an inferior court in any case in which a jury trial is constitutionally demandable. A jury trial is required in the first instance.²⁷ There are state decisions that have reached a contrary result in construing state constitutional provisions.²⁸ The Sixth Amendment is not, however, violated where an accused is tried by the same jury which had been dismissed after a demurrer to an indictment had been overruled. The failure to impanel a new jury after the subsequent plea of not guilty did not deprive the accused of his right to a jury trial.²⁹

The language of the federal constitutional provisions extend the right to trial by jury to all crimes except impeachment and to all criminal prosecutions. They do not, however, apply to proceedings that are not technically criminal in their nature such as civil proceedings for the collection of penalties³⁰ or the enforcement of forfeitures,³¹ those for the enforcement of statutes providing for the deportation of aliens,³² and contempt proceedings.³³ The right to a jury trial does not even extend

²⁵ See for illustrative cases *McCauley v. State*, 26 Ala. 135; *State v. Thompson*, 95 N.C. 596; *People v. Mitchell*, 266 N.Y. 15, 193 N.E. 445, 96 A.L.R. 791; *State v. Dalton*, 206 N.C. 507, 174 S.E. 422; *State v. Dolbow*, 117 N.J.L. 560, 189 A. 915, 109 A.L.R. 1488.

²⁶ *People v. Powell*, 87 Cal. 348, 25 P. 481, 11 L.R.A. 75.

²⁷ *Callan v. Wilson*, 127 U.S. 540, 8 S.Ct. 1301, 32 L.Ed. 223.

²⁸ *Brown v. Epps*, 91 Va. 726, 21 S.E. 119, 27 L.R.A. 676; *Wong v. Astoria*, 13 Or. 538, 11 P. 295.

²⁹ *Lovato v. New Mexico*, 242 U.S. 199, 37 S.Ct. 107, 61 L.Ed. 244.

³⁰ *Hepner v. United States*, 213 U.S. 103, 29 S.Ct. 474, 53 L.Ed. 720, 27 L.R.A., N.S., 739, 16 Ann.Cas. 960.

³¹ *United States v. Zucker*, 161 U.S. 475, 16 S.Ct. 641, 40 L.Ed. 777.

³² *Zakonaite v. Wolf*, 226 U.S. 272, 33 S.Ct. 31, 57 L.Ed. 218. If, however, the statute permits the infliction of punishment of an infamous character, the alien could undoubtedly demand a jury trial on that issue; see *Wong Wing v. United States*, 163 U.S. 228, 16 S.Ct. 977, 41 L.Ed. 140.

³³ See *In re Debs*, 158 U.S. 564, 15 S.Ct. 900, 39 L.Ed. 1092; *Gompers v. United States*, 233 U.S. 604, 34 S.Ct. 693, 58 L.Ed. 1115, Ann.Cas.1915D, 1044. Legislatures, however, have a

to all proceedings that are technically criminal in their nature. The trial of military prisoners, including those who have been discharged from the army, for offenses committed during their imprisonment may be had before a court martial in which there is no jury,³⁴ but Congress has no power to authorize military courts to try civilians for offenses committed by them where the ordinary courts are open and in the unobstructed exercise of their jurisdiction.³⁵ It has, furthermore, always been held that a jury trial was not guaranteed in the trial of petty offenses which, according to the common law, were summarily triable without a jury by justices of the peace in England or by corresponding judicial officers in the colonies, and which were punishable by commitment to jail, a workhouse or house of correction.³⁶ Misdemeanors punishable by small fine or short imprisonment are not crimes within the meaning of these constitutional safeguards.³⁷ The test generally employed for determining whether an offense is a mere petty offense or a crime is its nature, and, if it is *malum in se* or involves such obvious depravity as would shock the general moral sense, it is a crime and not a petty offense, regardless of the amount of its punishment.³⁸ The offenses of conspiracy³⁹ and reckless driving of a motor vehicle⁴⁰ have been held to be crimes in the trial of which the accused may demand a jury, while that of engaging in the business of a dealer in secondhand articles without a license has

limited power to grant a right to a jury trial in such cases; see *Michaelson v. United States ex rel. Chicago, St. P., M. & O. R. Co.*, 266 U.S. 42, 45 S.Ct. 18, 69 L.Ed. 162, 35 A.L.R. 451.

³⁴ *Kahn v. Anderson*, 255 U.S. 1, 41 S.Ct. 224, 65 L.Ed. 469.

³⁵ *Ex parte Milligan*, 4 Wall. 2, 18 L.Ed. 281.

³⁶ *Callan v. Wilson*, 127 U.S. 540, 8 S.Ct. 1301, 32 L.Ed. 223; *District of Columbia v. Colts*, 282 U.S. 63, 51 S.Ct. 52, 75 L.Ed. 177; *District of Columbia v. Clawans*, 300 U.S. 617, 57 S.Ct. 660, 81 L.Ed. 843.

³⁷ *Schick v. United States*, 195 U.S. 65, 24 S.Ct. 826, 49 L.Ed. 99, 1 Ann.Cas. 585. The due process clause

of the Fourteenth Amendment, U.S. C.A.Const., permits the summary trial without a jury of municipal police regulations punishable by a small fine; *Natal v. Louisiana*, 139 U.S. 621, 11 S.Ct. 636, 35 L.Ed. 288; nor does such procedure violate a state constitutional provision preserving the right of jury trial. *State ex rel. Strupp v. Anderson*, 165 Minn. 150, 206 N.W. 51.

³⁸ *District of Columbia v. Colts*, 282 U.S. 63, 51 S.Ct. 52, 75 L.Ed. 177.

³⁹ *Callan v. Wilson*, 127 U.S. 540, 8 S.Ct. 1301, 32 L.Ed. 223.

⁴⁰ *District of Columbia v. Colts*, 282 U.S. 63, 51 S.Ct. 52, 75 L.Ed. 177.

been held not to be such.⁴¹ It has never yet been determined whether an offense, trial without a jury so far as that depends upon its character, can be converted into a crime within the meaning of these constitutional provisions solely because of the severity of the punishment imposed thereon, but the discussion of that matter in one case at least warrants an inference that severity of punishment alone may ultimately be held a sufficient basis for requiring the trial of an offense by a jury.⁴² State constitutional provisions are also uniformly construed not to require the trial of petty offenses by a jury, but marked differences of opinion exist as to what are such.⁴³

It has now been definitely established that the federal constitutional guaranties for a jury trial do not define the essential structure of the tribunal that may constitutionally try persons accused of crime, but merely confer upon the accused a privilege for his own protection.⁴⁴ An accused may, accordingly, waive their protection either by dispensing with a jury altogether or by consenting to a trial by a jury of less than twelve.⁴⁵ There would seem to be no reason why he might not also waive the requirement of a unanimous verdict. The Supreme Court has rejected the view that there are any valid considerations of public policy against permitting an accused to waive this protection even in the case of one charged with the commission of a felony.⁴⁶ The state decisions construing state constitutional provisions are in conflict as to how far, if at all, an accused may waive his right to a jury trial.⁴⁷

⁴¹ *District of Columbia v. Clawans*, 300 U.S. 617, 57 S.Ct. 660, 81 L.Ed. 843.

⁴² See *District of Columbia v. Clawans*, 300 U.S. 617, 57 S.Ct. 660, 81 L.Ed. 843.

⁴³ See *Bell v. State*, 104 Neb. 203, 176 N.W. 544; *Stiess v. State*, 103 Ohio St. 33, 132 N.E. 85; *State v. Peterson*, 41 Vt. 504; *State v. Glenn*, 54 Md. 572; *In re Clancy*, 112 Kan. 247, 210 P. 487; *State v. Rodgers*, 91 N.J.L. 212, 102 A. 433.

⁴⁴ *PATTON v. UNITED STATES*, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854, 70 A.L.R. 263, *Black's Cas. Constitutional Law*, 2d, 674.

⁴⁵ *PATTON v. UNITED STATES*, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854, 70 A.L.R. 263, *Black's Cas. Constitutional Law*, 2d, 674.

⁴⁶ *PATTON v. UNITED STATES*, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854, 70 A.L.R. 263, *Black's Cas. Constitutional Law*, 2d, 674. See, also, *Schick v. United States*, 195 U.S. 65, 24 S.Ct. 826, 49 L.Ed. 99, 1 Ann.Cas. 585.

⁴⁷ Holding that it may be completely waived, *State ex rel. Warner v. Baer*, 103 Ohio St. 585, 134 N.E. 786; *Jennings v. State*, 134 Wis. 307, 114 N.W. 492, 14 L.R.A.,N.S., 862. Contra, *State v. Williams*, 195 Iowa 374, 191 N.W. 790; *Commonwealth*

There is no express federal constitutional provision requiring a state to provide a jury trial for the trial of any offense against it. The Supreme Court has thus far declined to derive it from any of the general limitations upon states contained in the Constitution.⁴⁸ It has, however, held that, so far as a state resorts to trial by jury, it is prohibited by the equal protection clause of the Fourteenth Amendment from systematically and arbitrarily excluding from a given jury persons belonging to a racial or other group to which the accused belongs merely because of their membership in such group.⁴⁹ Reasonable exclusions from jury service do not, however, violate due process.⁵⁰

Bills of Attainder

A bill of attainder has been defined as a legislative act which inflicts punishment without a judicial trial. It was generally known as a bill of pains and penalties if the punishment inflicted were less than death. The term as used in Sections 9 and 10 of Article 1 of the federal Constitution includes both bills of pains and penalties and bills of attainder in the strict sense thereof.⁵¹ The former of these provisions prohibits Congress, and the latter prohibits the states, from passing bills of attainder. Their purpose was to prevent legislative infliction of punishment without affording the accused the safeguards of a judicial trial. It has been held that state and federal laws requiring persons, as a condition precedent to the pursuit of a profession or to the exercise of certain procedural rights in court, to take an oath that they had not done certain acts, the

v. Hall, 291 Pa. 341, 140 A. 626, 58 A.L.R. 1023. Permitting withdrawal of a juror, *State v. Kaufman*, 51 Iowa 578, 2 N.W. 275, 33 Am.Rep. 148; *Commonwealth ex rel. Ross v. Egan*, 281 Pa. 251, 126 A. 488; *State v. Sackett*, 39 Minn. 69, 38 N.W. 773. *Contra*, *Cancemi v. People*, 18 N.Y. 128.

⁴⁸ See *Maxwell v. Dow*, 176 U.S. 581, 20 S.Ct. 448, 44 L.Ed. 597 (right to jury trial in state court held not a privilege of federal citizenship within meaning of U.S.C.A.Const. Fourteenth Amendment); *Hallinger v. Davis*, 146 U.S. 314, 13 S.Ct. 105, 36 L.Ed. 986 (a state statute permitting one accused of a capital offense to

waive a jury and elect to be tried by the court held not violative of due process); *Brown v. State of New Jersey*, 175 U.S. 172, 20 S.Ct. 77, 44 L.Ed. 119 (statute providing for trial of murder cases by struck jury held not violative of due process).

⁴⁹ *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664; *Norris v. Alabama*, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074.

⁵⁰ *Rawlins v. State of Georgia*, 201 U.S. 638, 26 S.Ct. 560, 50 L.Ed. 899, 5 Ann.Cas. 783.

⁵¹ *Cummings v. Missouri*, 4 Wall. 277, 18 L.Ed. 356.

doing of which afforded no reasonable test of their competence to pursue such profession or a reasonable regulation of the exercise of procedural rights, violated these constitutional prohibitions.⁵² It was held that the assumption by such laws of the guilt of the persons affected and adjudging their punishment conditionally amounted to an indirect attempt to declare their guilt and to inflict punishment upon them. These provisions are not limitations upon the character of punishment that Congress or a state may annex to the commission of crime, but on the method by which a person's guilt of committing it is determinable and by which the prescribed punishment therefor can be inflicted upon him. Hence a statute disqualifying one from holding public office upon conviction of a specified crime is not a bill of attainder.⁵³ A contention that a legislative body is passing a bill of attainder when exercising its constitutionally conferred power to expel a member has been summarily denied.⁵⁴ The constitutions of many of the states also prohibit the passage of bills of attainder.

CONDUCT OF PROSECUTIONS IN FEDERAL COURTS

326. The federal Constitution requires that a person charged with a federal offense of any character or degree be accorded a trial that is fair in all respects. It makes specific provision guaranteeing certain elements of a fair trial, and other elements are secured by that provision of the Fifth Amendment which provides that no person shall be deprived of life, liberty, or property without due process of law. It confers some rights that are important primarily because of their relation to the prosecution of those charged with an offense but which are not essential elements of the fair trial required by due process. The privilege against self-incrimination is an example thereof. It may, therefore, be stated that a person accused of a federal offense is entitled not only to a fair trial but also to the protection of those explicit constitutional guaranties that are not essential to the existence of a fair trial.

⁵² *Cummings v. Missouri*, 4 Wall. 277, 18 L.Ed. 356; *Ex parte Garland*, 4 Wall. 333, 18 L.Ed. 366; *Pierce v. Carskadon*, 16 Wall. 234, 239, 21 L.Ed. 276.

⁵³ *Crampton v. O'Mara*, 193 Ind. 551, 139 N.E. 360.

⁵⁴ *French v. Senate of California*, 146 Cal. 604, 89 P. 1031, 69 L.R.A. 556, 2 Ann.Cas. 756.

General Considerations

The specific limitations upon the conduct of the trial of a person charged with a federal offense are most of them contained in the Sixth Amendment. It has already been shown, when discussing the requirement of a jury trial, that that Amendment does not apply to the trial of those charged with misdemeanors and petty offenses, and the only reasonable position is that its other specific guaranties have the same restricted application.⁵⁵ This does not, however, involve the consequence that they may all be dispensed with in the trial of those charged with misdemeanors and petty offenses. The due process clause of the Fifth Amendment would require them to be observed in such cases so far as reasonably necessary to insure the accused a fair trial. The Supreme Court has employed that principle in determining the extent to which the due process clause of the Fourteenth Amendment accords persons being tried by a state the rights guaranteed an accused in a federal trial by the provisions of the federal Constitution,⁵⁶ and the only reasonable inference therefrom is that it would employ the same principle in determining how far the due process clause of the Fifth Amendment accorded an accused the same kind of protection referred to in the Sixth Amendment in cases other than the criminal prosecutions that are within its scope. No decisions have been found that hold either for or against the suggested position. The due process clause of the Fifth Amendment does, however, impose some requirements for criminal trials in federal courts that are not specifically required by any other constitutional provision. It was once held that it required not only that an accused plead or be ordered to plead to the charge against him, or that, in a proper case, a plea of not guilty be filed for him, but also that the record of his conviction show distinctly, and not merely by inference, that every step involved in due process of law and essential to a valid trial was taken in the trial court, and rendered erroneous a judgment where these conditions had not been observed, but this

⁵⁵ See *United States v. Zucker*, 161 U.S. 475, 16 S.Ct. 641, 40 L.Ed. 777 (holding that the right of confrontation does not exist in an action to recover a penalty under the revenue laws, but language in which might be construed to hold that the right

exists in all criminal prosecutions of whatever sort or degree).

⁵⁶ See discussion in *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674, 90 A.L.R. 575.

is no longer the law.⁵⁷ The due process clause is seldom invoked against the procedure followed in a federal criminal trial since objections are generally based upon the specific constitutional guaranties. It has been said to require that an accused be tried in a court of competent jurisdiction, be proceeded against only by orderly processes of law, and be punished only after inquiry and investigation, upon notice to him, and with an opportunity to be heard.⁵⁸ It may be safely inferred to include some of the requirements that the due process clause of the Fourteenth Amendment imposes upon state criminal trials that will be considered in the next Section.

Right to Speedy and Public Trial

The Sixth Amendment confers upon an accused the right to both a speedy and a public trial by a jury "in all criminal prosecutions." The right thereby conferred does not extend to the trial of misdemeanors and petty offenses, but the due process clause of the Fifth Amendment would undoubtedly impose such requirements in those cases. It has been held that the right to a speedy trial is relative, and that, though it secures rights to a defendant, it does not preclude the rights of public justice, and hence is not violated by proceedings to remove a person under indictment in a given district to another district to answer an indictment there found against him.⁵⁹ It thus affords an accused no immunity from arrest on another charge, nor any right to any particular order of trials for separate offenses. The right to a public trial guaranteed by this Amendment has received very little judicial construction. It clearly prevents a trial held in complete secrecy, but the better doctrine is that it does not require the unrestricted admittance to the trial of any member of the public wishing to attend it to the full capacity of the court room.⁶⁰ It is generally recognized that the preservation of order in the court room, or the protection of the public morals, may justify the exclusion of some part or all of the general public, but that even that power may not be

⁵⁷ *Crain v. United States*, 162 U.S. 625, 16 S.Ct. 952, 40 L.Ed. 1097, overruled in *Garland v. Washington*, 232 U.S. 642, 34 S.Ct. 456, 58 L.Ed. 772.

⁵⁸ *Ong Chang Wing v. United States*, 218 U.S. 272, 31 S.Ct. 15, 54 L.Ed. 1040.

⁵⁹ *Beavers v. Haubert*, 198 U.S. 77, 25 S.Ct. 573, 49 L.Ed. 950.

⁶⁰ *Reagan v. United States*, 9 Cir., 202 F. 488, 44 L.R.A.,N.S., 583; but see *Davis v. United States*, 8 Cir., 247 F. 394, L.R.A.1918C, 1164.

exercised if the accused is thereby deprived of the presence, aid or counsel of any person whose presence might have been of advantage to him, or if he is in any other manner prejudiced thereby.⁶¹ There are but few decisions on what constitutes a public trial within the meaning of the Sixth Amendment, and those that there are usually rely heavily upon state decisions. An accused may waive either of these rights.

Right to be Present at Trial

The federal Constitution does not expressly confer upon any accused the right to be present at his trial on a charge in a federal court. It is, however, universally asserted that he possesses that right if he is being tried for a felony or on a capital charge. It has been stated that it is a part of the rights secured by the Sixth Amendment without, however, indicating any particular provision thereof.⁶² It has also been intimated that the right to be heard which is guaranteed by due process probably includes the right to be present whenever the accused's presence bears a reasonably substantial relation to his opportunity to defend himself, but that it clearly does not go beyond that as a matter of due process.⁶³ The right based on the Sixth Amendment is always asserted to extend, in the case of felonies and capital offenses, to every stage of the trial from the empaneling of the jury to the reception of the verdict.⁶⁴ It seems also to be held that an accused who is in custody, or one charged with a capital offense, may not waive this right, but that in the case of those accused of felony but who are not in custody it may be waived.⁶⁵ The right is one to be present in the proceedings in the trial court only, not in those in an appellate court.⁶⁶ Since the Sixth Amendment does not apply to the trial of misdemeanors and petty offenses, the right to be present at such trial will probably be held protected by the due process

⁶¹ *Reagan v. United States*, 9 Cir., 202 F. 488, 44 L.R.A.,N.S., 583.

⁶² *Diaz v. United States*, 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed. 500, Ann. Cas.1913C, 1138.

⁶³ *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674, 90 A.L.R. 575.

⁶⁴ *Diaz v. United States*, 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed. 500, Ann. Cas.1913C, 1138.

⁶⁵ *Hopt v. People of Territory of Utah*, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262; *Diaz v. United States*, 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed. 500, Ann.Cas.1913C, 1138.

⁶⁶ *Schwab v. Berggren*, 143 U.S. 442, 12 S.Ct. 525, 36 L.Ed. 218 (a decision under the due process clause of U.S.C.A.Const. Fourteenth Amendment).

clause of the Fifth Amendment, but only so far as his presence is necessary to effectuate his right to be heard in defense of the charge.⁶⁷ It should be noted that the decisions of the Supreme Court on this matter frequently leave a doubt as to whether they are describing the requirements of the common law or of the Constitution.

Right to Assistance of Counsel

The Sixth Amendment confers upon an accused the right to have the assistance of counsel for his defense in all criminal prosecutions. The purpose of this provision has been stated to be to protect an accused from a conviction resulting from his own ignorance of his legal and constitutional rights, and that it may not be nullified by treating his ignorant failure to claim it as a waiver of his right. It is, however, a right which an accused may waive, but the trial court is required to see to it that the accused does so only with full knowledge of his rights.⁶⁸ It has been held that a compliance with this constitutional safeguard is an essential jurisdictional prerequisite to the court's jurisdiction to deprive an accused of his liberty, and that its failure to comply therewith voids the judgment of conviction and permits the accused's release in habeas corpus proceedings.⁶⁹ The court is, however, deemed to have jurisdiction if there is a proper waiver by the accused.⁷⁰ The Sixth Amendment probably does not protect this right in cases that do not constitute "criminal prosecutions." It has not been determined how far the due process clause of the Fifth Amendment protects it in other criminal proceedings.

Right of Confrontation

The Sixth Amendment guarantees an accused the right to be confronted with the witnesses against him in all criminal prosecutions. The purpose of this provision is to safeguard him

⁶⁷ *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674, 90 A.L.R. 575 (a decision under due process clause of U.S.C.A.Const. Fourteenth Amendment).

⁶⁸ *JOHNSON v. ZERBST*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, *Black's Cas. Constitutional Law*, 2d, 683.

⁶⁹ *JOHNSON v. ZERBST*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, *Black's Cas. Constitutional Law*, 2d, 683.

⁷⁰ *JOHNSON v. ZERBST*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, *Black's Cas. Constitutional Law*, 2d, 683.

against secret and inquisitorial methods of trial, and to secure to him the privilege of sifting and testing the evidence against him by cross-examination of the witnesses. The guaranty is clearly violated by the introduction of evidence given by witnesses whom the accused has had no opportunity to cross-examine. Hence a statute violates this provision which made the record of the conviction of one person of stealing given property conclusive evidence of the fact that property had been stolen in the prosecution of the receiver thereof.⁷¹ The admission of dying declarations is a recognized exception to the general rule based on necessity and historical considerations.⁷² The protection is not, however, limited to the use of evidence given by witnesses whom the accused has had no opportunity to cross-examine. It has thus been held that the provision is violated by admitting in evidence the statement of an absent witness taken at an accused's preliminary examination, at which he had an opportunity to cross-examine the witness, where the absence of the witness was not by the suggestion, connivance or procurement of the accused but due to the government's own negligence.⁷³ Where, however, the absence of a witness is due to the accused's own wrongful procurement his rights are not violated by admitting proof of what such witness had stated on a former trial of the accused for the same offense even though under a different indictment.⁷⁴ The same rule applies where the former witnesses are dead at the time of the subsequent trial.⁷⁵ Reason would require the same rule where the absence of the witnesses appearing at the former trial is due to other reasons beyond the control of the government. The right of the accused is that of being confronted by the witnesses against him, not of being confronted by officials of the trial court. It has, accordingly, been held that such right is not violated by an order from an appellate court directing the trial court to inform it whether the defendant had pleaded and been present at the trial, even when the order was made without notice to the defendant and while he was not before the appellate court.⁷⁶ This provision of the Sixth Amendment applies only to criminal prose-

⁷¹ Kirby v. United States, 174 U.S. 47, 19 S.Ct. 574, 43 L.Ed. 890.

⁷⁴ Reynolds v. United States, 98 U.S. 145, 25 L.Ed. 244.

⁷² Kirby v. United States, 174 U.S. 47, 19 S.Ct. 574, 43 L.Ed. 890.

⁷⁵ Mattox v. United States, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409.

⁷³ Motes v. United States, 178 U.S. 458, 20 S.Ct. 993, 44 L.Ed. 1150.

⁷⁶ Dowdell v. United States, 221 U.S. 325, 31 S.Ct. 590, 55 L.Ed. 753.

cutions. It does not apply to actions to recover penalties for violation of the revenue laws,⁷⁷ nor to contempt proceedings,⁷⁸ nor to extradition proceedings.⁷⁹ If the phrase "criminal prosecutions" has the same meaning as it has in defining the cases in which the Sixth Amendment requires a jury trial, then this right of confrontation does not exist in the trial of misdemeanors and petty offenses. It could, in those cases, be reasonably held to be essential to the fair trial required by the due process clause of the Fifth Amendment, but no decision so holding has been found.

Compelling the Attendance of Witnesses

The Sixth Amendment confers upon an accused in all criminal prosecutions the right to have compulsory process for obtaining witnesses in his favor. The case law construing the scope of this right is extremely meager. State constitutional provisions conferring a similar right have been held violated by court rules prohibiting the issue of more than five subpoenas for witnesses without an order of court, obtainable on application showing the materiality of the witnesses,⁸⁰ and by a statute permitting the prosecuting attorney to admit that an absent witness would testify to the facts as set forth in the affidavit on defendant's motion for a continuance, if he were present, since this forces the defendant to go to trial without the benefit of the witness' testimony.⁸¹ The provision of the Sixth Amendment has been construed to require an accused to be accorded sufficient time to procure the attendance of his witnesses, and the trial judge's discretion in refusing a continuance must be exercised in the light of that provision.⁸² The right would almost certainly be held so essential to an adequate opportunity for an accused's presentation of his defense as to be required by the due process clause of the Fifth Amendment in any criminal proceeding to which the Sixth Amendment does not apply.

⁷⁷ United States v. Zucker, 161 U.S. 475, 16 S.Ct. 641, 40 L.Ed. 777.

⁸⁰ Aikin v. State, 58 Ark. 544, 25 S.W. 840.

⁷⁸ Merchants' Stock & Grain Co. v. Board of Trade of City of Chicago, 8 Cir., 201 F. 20.

⁸¹ State v. Berkley, 92 Mo. 41, 4 S.W. 24.

⁷⁹ Ex parte LaMantia, D.C., 206 F. 330.

⁸² Paoni v. United States, 3 Cir., 281 F. 801.

Legislative Creation of Presumptions

The right to a fair trial that due process accords an accused includes immunity from conviction not based on evidence presented at his trial. It is also a universally accepted principle of our theory of government that an accused is presumed to be innocent and that the public must prove his guilt. The due process clauses of the federal Constitution prevent both Congress and a state from declaring an individual guilty or presumptively guilty of a crime, and to substitute legislative fiat for fact in the determination of an accused's guilt.⁸³ This does not, however, completely prevent the legislative creation of presumptions although it does limit their creation in important respects. The legislative creation of a conclusive presumption that the proof of a given fact or facts shall establish an accused's guilt of a defined crime does not constitute the establishment of a rule of evidence or of one regulating the burden of proof, but of a substantive rule of law defining a crime. The validity of such legislation, so far as due process is concerned, depends upon the extent to which due process is a limit on the substance of legislation. The present discussion is not concerned with presumptions of that character, but only with those that regulate the burden of proof or operate as evidence. The usual form of legislation of this type provides that proof of one fact or group of facts shall constitute prima facie evidence of some other fact or facts. Its usual effect is not merely to shift the duty of going forward with the evidence on the particular point to which the presumption relates, or even to shift the burden of proof, but also to permit the triers of fact to treat the legislatively defined fact or facts as evidence to be weighed in assessing the accused's guilt. It is invariably held that, where the legislation operates in this manner, due process requires that a rational connection exist between the fact proved and the ultimate fact presumed.⁸⁴ A statute that makes proof of the possession of opium sufficient evidence to authorize the conviction of a person charged with knowingly concealing opium imported in violation of law, "unless the defendant shall explain the possession to the satisfaction of the jury", and that puts on the accused the burden of rebutting the presumption that

⁸³ *McFarland v. American Sugar Refining Co.*, 241 U.S. 79, 36 S.Ct. 498, 60 L.Ed. 899; *Manley v. State of Georgia*, 279 U.S. 1, 49 S.Ct. 215, 73 L.Ed. 575.

⁸⁴ *Yee Hem v. United States*, 268 U.S. 178, 45 S.Ct. 470, 69 L.Ed. 904; *Casey v. United States*, 276 U.S. 413, 48 S.Ct. 373, 72 L.Ed. 632.

the opium was imported subsequent to date when the prohibition of its importation took effect, has been held valid.⁸⁵ But one that made proof of a bank's insolvency presumptive evidence that the insolvency was fraudulent has been held so arbitrary as to deny due process.⁸⁶ Due process further requires that the statute permit an accused a fair opportunity to repel even a valid presumption, and a statute that unreasonably restricts the character of the proof by which the presumption can be rebutted violates due process.⁸⁷ It depends upon the particular statute whether it accords with that constitutional requirement in this respect. The extent to which due process limits the weight that a statute may require or permit a jury to give to presumptions in determining the question of an accused's guilt is enmeshed in doubt.⁸⁸

It has been stated that there are presumptions "that are not evidence in a proper sense, but simply regulations of the burden of proof."⁸⁹ It is probably the law that due process requires such presumptions also to satisfy the standard that there be a rational connection between what is proved and what is to be inferred.⁹⁰ It requires in any case either that the government "shall have proved enough to make it just for the defendant to be required to repel what has been proved", or that "upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression."⁹¹ A statute

⁸⁵ *Yee Hem v. United States*, 268 U.S. 178, 45 S.Ct. 470, 69 L.Ed. 904. For other cases sustaining legislation creating presumptions, see *Cockrill v. People of California*, 268 U.S. 258, 45 S.Ct. 490, 69 L.Ed. 944; *Hawes v. State of Georgia*, 258 U.S. 1, 42 S.Ct. 204, 68 L.Ed. 431; *Morrison v. People of California*, 288 U.S. 591, 53 S.Ct. 401, 77 L.Ed. 570 (discussed in *Morrison v. People of State of California*, 291 U.S. 82, 54 S.Ct. 281, 78 L.Ed. 664).

⁸⁶ *Manley v. State of Georgia*, 279 U.S. 1, 49 S.Ct. 215, 73 L.Ed. 575. See, also, for another example, *People v. Licavoli*, 264 Mich. 643, 250 N.W. 520.

⁸⁷ *Manley v. State of Georgia*, 279 U.S. 1, 49 S.Ct. 215, 73 L.Ed. 575;

People v. Hoogy, 277 Mich. 578, 269 N.W. 605.

⁸⁸ For a discussion of the extent to which legislation of this character is valid under state constitutional provisions requiring trial by jury in criminal proceedings, see *State v. Lapointe*, 81 N.H. 227, 123 A. 692, 31 A.L.R. 1212, and cases therein cited and discussed.

⁸⁹ *Casey v. United States*, 276 U.S. 413, 48 S.Ct. 373, 72 L.Ed. 632.

⁹⁰ See *Manley v. State of Georgia*, 279 U.S. 1, 49 S.Ct. 215, 73 L.Ed. 575.

⁹¹ *Morrison v. People of State of California*, 291 U.S. 82, 54 S.Ct. 281, 78 L.Ed. 664.

that puts on an accused the burden of proving facts peculiarly within his knowledge and hidden from discovery by the government is valid on that basis.⁹² However, a statute that prohibits the occupation of agricultural lands by an alien ineligible for naturalization violates due process so far as it makes allegation of membership in a race thus ineligible plus proof of occupation of such lands the basis for shifting to those accused of violating the statute the burden of proving that the alien is either a citizen or eligible for citizenship.⁹³ The Court's view was that the probability of injustice to an accused therefrom outweighed the public interest in convenience of proving its case. The principle invoked was that due process prohibits the transfer of the burden of proof to the accused where this results in grave injustice to him that far outweighs the procedural convenience to the government therefrom. It is probable that the same principles would determine the validity of creating presumptions that shifted merely the duty to go forward with the evidence. It is certain that they limit the power of the legislature to shift either directly as well as by the establishment of presumptions.⁹⁴

Privilege Against Self-Incrimination

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." This is a limitation upon the federal government only, and hence a state does not violate it even by refusing to extend a similar privilege to those within its jurisdiction.⁹⁵ The object of the provision was to insure a person against being compelled in any manner or at any time to give testimony that might expose him to prosecution for crime. The test of his right to assert his privilege is not the character of the proceedings in which it is sought to compel him to give such testimony but the fact that

⁹² *Casey v. United States*, 276 U.S. 413, 48 S.Ct. 373, 72 L.Ed. 632.

⁹³ *Morrison v. People of State of California*, 291 U.S. 82, 54 S.Ct. 281, 78 L.Ed. 664.

⁹⁴ The cases cited in connection with the instant problem have included those construing the due process clause of the Fourteenth Amendment, U.S.C.A.Const., as well as those based on said clause of the Fifth

Amendment, U.S.C.A.Const. The principles discussed are thus as applicable to a state as to the federal government. The due process clauses of state constitutions are also at times similarly construed; *People v. Licavoli*, 264 Mich. 643, 250 N.W. 520; *People v. Hoogy*, 277 Mich. 578, 269 N.W. 605. See, also, footnote 88.

⁹⁵ See *Jack v. Kansas*, 199 U.S. 372, 26 S.Ct. 73, 50 L.Ed. 234, 4 Ann. Cas. 689.

its assertion is for the purpose of protecting him against being forced to do that against the compulsory doing of which the Constitution protects him. It protects him not only in criminal proceedings against himself but also when he is a witness in proceedings or investigations of any character whatever.⁹⁶ The privilege may thus wear a double aspect depending upon the character of the proceedings in which it is invoked. If it is a criminal proceeding against the party invoking it, the privilege is that of not being compelled to take the witness stand or to answer any questions at all. If it is a proceeding of a civil nature, an investigation of some character, or a criminal proceeding against some one other than himself, he may be required to testify, but has the privilege of refusing to answer any question the answer to which might incriminate him. It has, accordingly, been held that a bankrupt may invoke the privilege in his examination before the referee by refusing to answer questions concerning the schedules filed by him the answer to which would incriminate him.⁹⁷ It has been stated that proceedings before a grand jury are criminal proceedings, but the case involved the right to answer particular questions rather than that of not being a witness at all.⁹⁸ It has also been stated that, while a person could not invoke the privilege to excuse his failure to make a federal income tax return with respect to income derived from crime, it might be invoked to excuse the failure to answer any question on the return the answer to which might incriminate the taxpayer.⁹⁹ The privilege may thus be said to extend to more than formal legal proceedings.

The privilege against self-incrimination clearly protects one against being compelled to give oral testimony that might incriminate him. It is not, however, limited thereto, but has been construed to protect one against being compelled to produce and submit for examination by public authorities his books, papers and other effects that are of a self-incriminating character.¹

⁹⁶ See discussion in *Counselman v. Hitchcock*, 142 U.S. 547, 12 S.Ct. 195, 35 L.Ed. 1110.

⁹⁷ *McCarthy v. Arndstein*, 266 U.S. 34, 45 S.Ct. 16, 69 L.Ed. 153.

⁹⁸ *Counselman v. Hitchcock*, 142 U.S. 547, 12 S.Ct. 195, 35 L.Ed. 1110. For state cases on this point, see

Boone v. People, 148 Ill. 440, 36 N.E. 99; *In re January*, 295 Mo. 653, 246 S.W. 241.

⁹⁹ *United States v. Sullivan*, 274 U.S. 259, 47 S.Ct. 607, 71 L.Ed. 1037, 51 A.L.R. 1020.

¹ *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746. For

It is immaterial whether the demand for their production takes the form of a search warrant or a subpoena duces tecum. There is no general prohibition against the use of such material in evidence against a person merely because it was obtained illegally as by theft by private parties who turned it over to federal prosecuting officers.² It is only when a person's papers or other effects are obtained by methods involving a violation of his privilege against unreasonable searches and seizures accorded him by the Fourth Amendment that their use in evidence against him violates his privilege against compulsory self-incrimination.³ The issue that is generally discussed in the decisions dealing with this matter is whether the papers or other effects were obtained by a search and seizure in violation of the Fourth Amendment. This matter has already been elsewhere discussed.⁴ It suffices at this point to state that, if they were obtained in violation of the Fourth Amendment, their owner can effectually prevent their use in evidence against him by invoking the Fifth Amendment, but not otherwise.⁵ The extent to which the privilege protects one against being compelled to submit to an examination of his person is a matter on which there are but few decisions, but the Supreme Court has held that it does not prevent testimony that an accused had put on a particular blouse and that it had fitted him, which was given to prove that it was his, even though he had done so under duress.⁶ The Fifth Amendment was stated not to require the exclusion of an accused's body as evidence when it might be material. The privilege prevents the use in evidence against

state cases announcing the same doctrine, see *State v. Davis*, 108 Mo. 666, 18 S.W. 894, 32 Am.St.Rep. 640; *People v. Zazove*, 311 Ill. 198, 142 N.E. 543.

² *Burdeau v. McDowell*, 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048, 13 A.L.R. 1159; *Olmstead v. United States*, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944, 63 A.L.R. 376.

³ *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746.

⁴ See Chapter 19, Section 309. The decisions of state courts in construing similar state constitutional pro-

visions are also discussed in said Chapter and Sections.

⁵ See Chapter 19, Section 309.

⁶ *Holt v. United States*, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021, 20 Ann.Cas. 1138. For state cases dealing with this general subject, see *People v. Gardner*, 144 N.Y. 119, 38 N.E. 1003, 28 L.R.A. 699, 43 Am.St. Rep. 741; *State v. Height*, 117 Iowa 650, 91 N.W. 935, 59 L.R.A. 437, 94 Am. St. Rep. 323; *Davis v. State*, 131 Ala. 10, 31 So. 569; *State v. Ah Chuey*, 14 Nev. 79, 33 Am.Rep. 530; *State v. Johnson*, 67 N.C. 55. It should be noted that the state decisions in this field are conflicting.

him of a person's involuntary confession.⁷ Its protection may not be indirectly defeated as by permitting federal officers or others to testify concerning the results of an invalid search and seizure where those results have been suppressed as evidence because of that invalidity. It also invalidates permitting the government to introduce in evidence, in order to get before the jury admissions contained therein, the affidavits filed by the accused in support of his motion to suppress evidence obtained by an invalid search.⁸ A statute that would in effect permit or require the drawing of inferences prejudicial to a person from his invoking his immunity would violate it. A statute that provides that the unexplained failure to produce documents in response to a court order should be taken as a confession of the allegations contained in the motion on which the order was based is invalid as a violation of the privilege when applied to a case in which the order involves a violation of the privilege against unreasonable searches and seizures.⁹

The reason for conferring the privilege against self-incrimination was not to protect a person against being compelled merely to disclose facts that would tend to incriminate him, but to protect him against being compelled to furnish evidence that could be used as the basis for bringing and prosecuting criminal proceedings against him. If, therefore, he is for any reason no longer subject to any form of criminal liability for or on account of any transaction concerning which he may testify or produce evidence, the sole purpose for which the privilege was conferred no longer exists, and his right to invoke its protection is lost. If the statute of limitations has run against every such possible criminal liability, or if it has been wiped out by a valid and accepted pardon, he may constitutionally be compelled to testify or produce evidence concerning those matters.¹⁰

⁷ *Bram v. United States*, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568.

⁸ *Safarik v. United States*, 8 Cir., 62 F.2d 892.

⁹ *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746. For state decisions discussing accused's protection from being called upon to produce certain evidence in the presence of the jury under circumstances where his failure to comply would

be prejudicial to him, see *Commonwealth v. Valeroso*, 273 Pa. 213, 116 A. 828; *Gillespie v. State*, 5 Okl.Cr. 546, 115 P. 620, 35 L.R.A.,N.S., 1171, Ann.Cas.1912D, 259; *People v. Gibson*, 218 N.Y. 70, 113 N.E. 730, Ann. Cas.1918B, 509.

¹⁰ See discussion of these matters in *Brown v. Walker*, 161 U.S. 591, 16 S.Ct. 644, 40 L.Ed. 819. For state cases see *Childs v. Merrill*, 66 Vt. 302, 29 A. 532.

The mere offer of a pardon which is not accepted does not defeat the person's right to invoke the privilege against self-incrimination.¹¹ A statute that confers an immunity from prosecution as broad as the protection accorded by the constitutional privilege itself deprives one of his right to invoke its protection. An immunity statute that merely prohibits evidence compulsorily given to be thereafter used against the witness in any criminal or forfeiture proceedings is too narrow since it would still permit such evidence to be used to search out other evidence which could then be used against him in such proceedings.¹² One that provides that no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of anything concerning which he may testify or produce evidence affords the requisite degree of protection so as to deprive a person within its provisions of his right to invoke the privilege.¹³ The immunity required is immunity from successful prosecution, not from the institution of criminal proceedings.¹⁴ It need not include immunity from criminal liability for perjury committed while giving the testimony, but only with respect to past offenses.¹⁵ It is in the cases discussing this matter that the question has been most discussed whether the constitutional privilege protects one against testifying or giving evidence that would furnish a basis for criminal proceedings against him by some government other than the federal government. Whatever uncertainty may once have existed as to the law on that matter,¹⁶ it has now been definitely settled that the privilege conferred by the Fifth Amendment protects a person only against being forced to disclose matters that could be directly or indirectly used against him in federal criminal, penalty or forfeiture proceedings. It does not confer a privilege of being excused from testifying or giving evidence demanded under the authority of the federal government because it might be used against him in some form of criminal proceedings brought by a

¹¹ *Burdick v. United States*, 236 U.S. 79, 35 S.Ct. 267, 59 L.Ed. 476. As to whether there are any restrictions on a person's power to refuse to accept a pardon, see *Biddle v. Perovich*, 274 U.S. 480, 47 S.Ct. 664, 71 L.Ed. 1161, 52 A.L.R. 832.

¹² *Counselman v. Hitchcock*, 142 U.S. 547, 12 S.Ct. 195, 35 L.Ed. 1110.

¹³ *Brown v. Walker*, 161 U.S. 591, 16 S.Ct. 644, 40 L.Ed. 819.

¹⁴ *Heike v. United States*, 217 U.S. 423, 30 S.Ct. 539, 54 L.Ed. 821.

¹⁵ *Glickstein v. United States*, 222 U.S. 139, 32 S.Ct. 71, 56 L.Ed. 128.

¹⁶ See *Brown v. Walker*, 161 U.S. 591, 16 S.Ct. 644, 40 L.Ed. 819; *Ballmann v. Fagin*, 200 U.S. 186, 26 S.Ct. 212, 50 L.Ed. 433.

state or another country. This principle also determines whether a federal statute of limitations or immunity statute, or a federal pardon, is broad enough to defeat one's right to invoke the protection of the constitutional privilege.¹⁷

The privilege conferred by the Fifth Amendment is not restricted to citizens of the United States, and may be invoked by an alien as well as a citizen.¹⁸ A corporation has, however, been held not to be a "person" within its protection.¹⁹ The privilege is personal to the witness. It does not protect him against giving evidence that will incriminate some other person even though he were the latter's agent.²⁰ Nor can one against whom a witness is testifying object that it incriminates him, nor even that it also incriminates the witness since the latter alone can claim the privilege on his own behalf. The privilege is one that may be waived. It is deemed waived with respect to given testimony if that was voluntarily given by an accused at his preliminary hearing, and the evidence so given may be used against him at his trial.²¹ An accused is deemed to have waived it if he voluntarily becomes a witness on his own behalf, and he may then be required to answer all questions put to him within the legitimate bounds of cross-examination.²² It is the general rule that the final decision on whether the answers to a given question will tend to incriminate the witness is to be made by the court, not by the witness.²³

¹⁷ *United States v. Murdock*, 284 U.S. 141, 52 S.Ct. 63, 76 L.Ed. 210, 82 A.L.R. 1376. This case also states that lack of state power to give witnesses protection against federal prosecution does not defeat a state immunity statute. That neither the Fifth nor Fourteenth Amendment, U.S.C.A.Const., are violated by holding that the privilege against self-incrimination does not extend to protect one against giving testimony incriminating one under the laws of a jurisdiction other than that in which the privilege is demanded, see *Republic of Greece v. Koukouras*, 264 Mass. 318, 162 N.E. 345.

¹⁸ *United States v. Brooks, D.C.*, 284 F. 908.

¹⁹ *Wilson v. United States*, 221 U.S. 361, 31 S.Ct. 538, 55 L.Ed. 771, Ann. Cas.1912D, 558.

²⁰ *Hale v. Henkel*, 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652.

²¹ *Powers v. United States*, 223 U.S. 303, 32 S.Ct. 281, 56 L.Ed. 448.

²² *Sawyer v. United States*, 202 U.S. 150, 26 S.Ct. 575, 50 L.Ed. 972, 6 Ann.Cas. 269; *Powers v. United States*, 223 U.S. 303, 32 S.Ct. 281, 56 L.Ed. 448.

²³ *Mason v. United States*, 244 U.S. 362, 37 S.Ct. 621, 61 L.Ed. 1198.

Appeals

There is no express provision in the federal Constitution requiring those convicted of crime to be granted an appeal. The only general provision from which it might plausibly be deduced is the due process clause of the Fifth Amendment. It has, however, been stated that "due process does not comprehend the right of appeal."²⁴ It has also been stated that a right of appeal in a criminal case is not an essential element of due process under the Fourteenth Amendment.²⁵ It may, therefore, be taken as definitively established that failure to provide an appeal to one convicted of a federal offense denies none of his constitutional rights.

CONDUCT OF PROSECUTIONS IN STATE COURTS

327. The states are limited in their conduct of criminal proceedings by state constitutional provisions which are in general of the same character as those imposed upon the federal government by the federal constitutional provisions discussed in Section 326. They are further limited in this matter by the requirements of the due process clause of the Fourteenth Amendment that an accused be accorded a fair trial with notice of the charge against him and an adequate opportunity to be heard in defense of it. The equal protection clause of that Amendment prohibits them from making unreasonable classifications in establishing their rules of criminal procedure.

General Considerations

The limitations within which a state must conduct the trial of persons accused of crime are defined by certain provisions of the federal Constitution as well as those contained in its own constitution. The constitutions of all of the states contain provisions according an accused some or all of the rights and privileges guaranteed those tried under the authority of the federal government which were discussed in the preceding section. The footnotes thereto refer to some of the state decisions construing state constitutional provisions of that character, and space limitations prevent their more extended consideration. The present section will, therefore, be almost wholly limited to dis-

²⁴ District of Columbia v. Clawans, 300 U.S. 617, 57 S.Ct. 660, 81 L.Ed. 843. ²⁵ McKane v. Durston, 153 U.S. 684, 14 S.Ct. 913, 38 L.Ed. 867.

cussing the limitations imposed on a state in these respects by the provisions of the federal Constitution. The principal provision thereof bearing on this matter is that clause of the Fourteenth Amendment which prohibits a state from depriving any person of life, liberty, or property without due process of law. It should be noted that this is a limit upon the states in construing the provisions of their own constitutions as well as in the enactment and enforcement of legislation and the making of rules of court governing the conduct of criminal trials.

Requirement of a Fair and Impartial Tribunal

It has been frequently stated that the due process clause of the Fourteenth Amendment does not impose upon the states any particular form or mode of procedure "so long as the essential rights of notice and a hearing, or opportunity to be heard, before a competent tribunal are not interfered with."²⁶ This is still correct in the sense that due process requires this, but not in the sense that notice and hearing before a competent tribunal satisfy all of its requirements.²⁷ It demands that the trial shall be a fair trial in all respects and at all of its stages. The trial must be before a tribunal having jurisdiction to try persons for the offense with which the accused is charged, and the accused must be within its jurisdiction when being tried. It does not, however, require a common law, or any other, jury to be a part of such tribunal even in the trial of those accused of capital offenses or felonies. This is the clear intimation of the decisions although it cannot be said to have ever been definitively decided.²⁸ It has been held not to prohibit the trial of a person accused of murder by a struck jury rather than by one selected in the ordinary manner,²⁹ nor to require that the right to a jury trial accorded such person by the state constitution be not capable of waiver by him.³⁰ It is not violat-

²⁶ Frank v. Mangum, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969.

²⁷ Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791, 98 A.L.R. 406.

²⁸ See Dow v. Maxwell, 176 U.S. 581, 20 S.Ct. 448, 44 L.Ed. 597 (holding right to jury trial not to be a privilege of federal citizenship protected against impairment by a state by the Fourteenth Amendment, U.S.

C.A.Const.); Brown v. State of Mississippi, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682.

²⁹ Brown v. State of New Jersey, 175 U.S. 172, 20 S.Ct. 77, 44 L.Ed. 119.

³⁰ Hallinger v. Davis, 146 U.S. 314, 13 S.Ct. 105, 36 L.Ed. 986. See in this connection People v. Hickman, 204 Cal. 470, 268 P. 909, 270 P. 1117 (sustaining as not violative of due

ed by the trial and conviction of a person of murder by a jury including one juror, concerning whose sanity there existed a doubt, merely because the state was permitted to prove his sanity by a preponderance of evidence rather than beyond a reasonable doubt.³¹ It is undoubted, however, that, where the state accords an accused a jury trial, due process requires it to accord him the right to have excluded from the jury those who cannot reasonably be expected to give him a fair trial. This at least is implicit in the decisions that hold it to require a trial before an impartial tribunal where that consists solely of a magistrate or judge acting without a jury. A trial before the mayor of a city acting as a magistrate under an arrangement by which in effect he received his compensation for conducting the trial only if the accused were convicted denies the latter the fair trial to which due process entitles him.³² The magistrate's direct pecuniary interest in securing a conviction was held to prevent a fair trial. It was also held in the same case that his interest as the chief executive of the town which was to receive a part of the fine imposed upon conviction prevented a fair trial or a fair sentence because the magistrate would have a strong motive to help his town by a conviction and a heavy fine. The decision was followed by others that sought to define its limits more precisely. Due process is not denied where the magistrate trying the accused, though a member of a city's governing commission, exercises judicial functions only and receives a fixed salary not dependent upon the collection of fines.³³ The mere fact that the fines are covered into the town's general fund from which the magistrate's salary is paid was held insufficient to vitiate the trial since the magistrate's duties were solely judicial. The action of the magistrate in the *Tumey Case* was final so far as his decision on matters of fact were concerned, and the accused had no right to a jury trial. It has been held that, where the procedure permits an appeal from the magistrate's

process clause of Fourteenth Amendment, U.S.C.A.Const., and a state constitutional provision guaranteeing trial by jury, a statute permitting an accused to enter a plea of "not guilty by reason of insanity" which had the effect of admitting guilt, except as insanity affected that issue, but under which the accused could also enter other pleas, including that of "not guilty").

³¹ *Jordan v. Massachusetts*, 225 U. S. 167, 32 S.Ct. 651, 56 L.Ed. 1038.

³² *Tumey v. State of Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749, 50 A.L.R. 1243.

³³ *DUGAN v. STATE OF OHIO*, 277 U.S. 61, 48 S.Ct. 439, 72 L.Ed. 784, *Black's Cas. Constitutional Law*, 2d, 680.

decision to another court wherein there is a trial de novo, or where the accused is entitled to demand a jury when being tried before a magistrate having a direct pecuniary interest in convicting the accused, the Tumey Case has no application, and that a trial before an interested magistrate under such safeguards does not deny the accused due process.³⁴ In view of the prevalence of jury trials in criminal proceedings, this problem is likely to arise only in the field of petty offenses, but the foregoing principles would apply to the trial of any offense.³⁵

Due process requires not only that the tribunal be fair and impartial but that the conditions under which the trial is had be such as to insure a fair and impartial trial. It is because the trial fails to meet this standard that a trial, so dominated by a mob that the jury is intimidated and the judge yields to its threats, is held to deny the accused due process. If a state furnishes no adequate corrective processes in such case, but carries into execution the judgment based on a verdict so arrived at, it is held to deprive the accused of life, liberty, or property without due process of law.³⁶ If it furnishes adequate corrective process the enforcement of the judgment would not be unconstitutional.³⁷ Mere perfection in the legal machinery for correcting the violation of the accused's rights is not sufficient.³⁸ The state must afford the accused at least a right to have the issue of mob domination thoroughly and fairly passed upon in a judicial proceeding not itself dominated by a mob or failing in any other respect to meet the due process standard of a fair trial on that issue. Federal courts have been permitted to interfere to protect one convicted under such circumstances where it was clear that the state's corrective process was inadequate.³⁹

Other Requirements of a Fair Trial

The right to notice of the charge against him and to an opportunity to defend himself against it are essential elements

³⁴ State v. Schelton, 205 Ind. 416, 186 N.E. 772; Ex parte Lewis, 47 Okl.Cr. 72, 288 P. 354.

³⁵ For a discussion of the problem of interest as it affects the competency of judge or jury to try an accused, see Tumey v. State of Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749.

³⁶ Moore v. Dempsey, 261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543.

³⁷ Frank v. Mangum, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969.

³⁸ Moore v. Dempsey, 261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543.

³⁹ Moore v. Dempsey, 261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543.

of the fair trial guaranteed an accused by the due process clause of the Fourteenth Amendment. The former of these does not necessarily require a formal arraignment of the accused where the failure does not injuriously affect any of his substantial rights.⁴⁰ There have been numerous decisions on what is necessary in order that the accused's right to be heard in defense against the charge against him satisfy the requirements of due process. It undoubtedly includes a right on his part to be present at the trial if he wishes to be present, but his presence when the verdict is rendered is not so essential a part of a fair hearing, even in a murder trial, as to invalidate a rule of court permitting the accused to waive it and holding him bound by the waiver whether given before or after the event, and under which the making of a motion for a new trial on some other ground constituted a waiver.⁴¹ Nor is due process denied one on trial for murder by applying to him a statute under which his occasional voluntary absence from the trial would not constitute reversible error where his substantial rights were not injured thereby.⁴² His right is clearly not infringed where his own conduct makes his removal necessary in order that the trial may proceed.⁴³ The due process clause confers upon the accused a right to be present only when his presence has a reasonably substantial relation to the opportunity to be heard to which due process entitles him, and this applies in all cases.⁴⁴ His rights are not violated by denying him the right to be present at a view by the jury, in the presence of the judge and the accused's counsel, of the premises where the crime of murder was alleged to have been committed.⁴⁵ The principle stated above is a reasonable one by which to measure the extent of the accused's rights in this matter. In the case last cited the Court also stated that it assumed that due process conferred upon an accused the right to confront the witnesses against him.

The right to a fair hearing guaranteed by due process includes that of an accused to be heard by counsel employed by

⁴⁰ *Garland v. State of Washington*, 232 U.S. 642, 34 S.Ct. 456, 58 L.Ed. 772.

⁴¹ *Frank v. Mangum*, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969.

⁴² *Howard v. Commonwealth of Kentucky*, 200 U.S. 164, 26 S.Ct. 189, 50 L.Ed. 421.

⁴³ See *United States v. Davis*, Fed. Cas.No.14,923 (no reference to due process).

⁴⁴ *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674, 90 A.L.R. 575.

⁴⁵ *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674, 90 A.L.R. 575.

him, if he so desires. It is the duty of the trial court to give him, as an element in that right, a reasonable time and opportunity to procure counsel.⁴⁶ He has this right in any case, whether he is being charged with a felony or merely with a misdemeanor. There are also circumstances under which due process requires the trial court to appoint counsel for an accused unable to provide himself therewith. It has been held to require this in capital cases where the accused is unable to employ counsel, and, because of his youth, ignorance or other similar reasons, is unable to adequately defend himself.⁴⁷ The same case held that this duty is not properly discharged by making a vague and indefinite appointment of counsel, nor by making the appointment at such time and under such circumstances as preclude counsel from giving effective aid in the preparation and trial of the case. It is practically certain that this duty will be extended to other than capital cases, and under other circumstances than those present in the case last cited. That case may also be taken to establish the necessity for according the accused an adequate opportunity to prepare his defense.⁴⁸ This does not, however, entitle him to a continuance because of the absence of material witnesses residing in another state whose presence the court is powerless to enforce.⁴⁹ It confers no right upon an accused, who is at the time serving a sentence, to be entirely released from custody, but does entitle him to confer with his counsel to arrange his defense while being kept in custody.⁵⁰ Neither the due process clause of the Fourteenth Amendment, nor any other provision of the federal Constitution, require a state to grant an accused the privilege against compulsory self-incrimination.⁵¹ The former restricts the states in creating presumptions and shifting the burden of proof in the same manner as the due process clause of the Fifth Amendment restricts the federal government in those respects.⁵² A recent

⁴⁶ *Powell v. State of Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527.

See also *Franklin v. State of South Carolina*, 218 U.S. 161, 30 S.Ct. 640, 54 L.Ed. 980.

⁴⁷ *Powell v. State of Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527.

⁵⁰ *Kelley v. State of Oregon*, 273 U.S. 589, 47 S.Ct. 504, 71 L.Ed. 790.

⁴⁸ See also *Commonwealth v. O'Keefe*, 298 Pa. 169, 148 A. 73.

⁵¹ *Twining v. State of New Jersey*, 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97.

⁴⁹ *Minder v. State of Georgia*, 183 U.S. 559, 22 S.Ct. 224, 46 L.Ed. 328.

⁵² See Section 326.

important extension has been made of what due process requires for a fair trial. It has been decided that due process is denied where the state contrives to secure a conviction through a deliberate deception of the court and jury by presenting evidence known to be perjured,⁵³ and also when the sole basis for a conviction and sentence is a confession obtained by coercion, brutality, and violence.⁵⁴ These principles would also apply in defining what the due process clause of the Fifth Amendment requires in the case of federal criminal trials.

DOUBLE JEOPARDY

328. The Fifth Amendment to the Constitution provides that no person shall be "subject for the same offense to be twice put in jeopardy of life and limb." The constitutions of most of the several states contain a similar provision. It is undetermined whether any provision of the federal Constitution prohibits a state from subjecting a person to more than a single jeopardy for the same offense.

General Considerations

The provision of the Fifth Amendment referred to above applies to the federal government only and not to the states. It resembles in this the other provisions of the federal Bill of Rights. Although its language refers only to being twice put in jeopardy of "life and limb", a liberal judicial construction has extended the meaning of that expression to all punishable offenses, misdemeanors as well as felonies and treason.⁵⁵ It is not a guaranty that a second prosecution for the same offense shall not be begun against a person, but only that he will be able successfully to repel the second prosecution or avoid punishment as a result thereof by relying upon his former jeopardy. The two principal questions concerning the scope of this provision and similar state constitutional provisions have been when a person can be deemed to have been in jeopardy with respect

⁵³ *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791, 98 A.L.R. 406.

⁵⁴ *BROWN v. STATE OF MISSISSIPPI*, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682, *Black's Cas. Constitutional Law*, 2d, 689.

⁵⁵ *Berkowitz v. United States*, 3 Cir., 93 F. 452; *Jarl v. United States*, 8 Cir., 19 F.2d 891. The doctrine of double jeopardy has, however, no application to contempt proceedings; *State v. Kasherman*, 177 Minn. 200, 224 N.W. 833.

to a given offense, and when two offenses must be deemed to be the same.

What Constitutes Jeopardy

A criminal proceeding consists of many separate steps. The problem of what constitutes jeopardy is principally that of how many of such steps must have been taken and completed in a criminal trial in order that the accused can be said to have been subjected to jeopardy therein. It is first of all essential that the proceedings be in a court having jurisdiction to try the offense and of the accused.⁵⁶ A trial on a defective indictment does not deprive the court of jurisdiction since that does not void its judgment but merely renders it voidable.⁵⁷ A person is not subjected to jeopardy merely by being arrested, subjected to a preliminary examination, and being thereupon discharged,⁵⁸ nor by having criminal proceedings instituted against him by indictment or otherwise, not even where this is followed by arraignment, pleading thereto, and eventual dismissal at the instance of the prosecuting officer on the grounds of insufficient evidence to hold the accused.⁵⁹ A dismissal based on defects in the indictment or information would clearly not involve any jeopardy for the accused. It is universally held that jeopardy cannot attach in a prosecution requiring a jury trial until the jury has been impanelled, sworn, and charged to try the case and render a true verdict therein upon the law and the evidence. There are many decisions that hold that it attaches at that time.⁶⁰ All, however, hold that, if an accused is discharged without a verdict on account of some imperative necessity such as the sickness of the judge, or the sickness, insanity or misconduct of a juror, a second trial may lawfully be had.⁶¹ It has,

⁵⁶ *Rector v. State*, 6 Ark. 187; *Scaif v. Commonwealth*, 195 Ky. 830, 243 S.W. 1034.

⁵⁷ *United States v. Ball*, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300.

⁵⁸ *Collins v. Loisel*, 262 U.S. 426, 43 S.Ct. 618, 67 L.Ed. 1062; *Commonwealth v. Rice*, 216 Mass. 480, 104 N.E. 347; *People v. Dillon*, 197 N.Y. 254, 90 N.E. 820, 18 Ann.Cas. 552.

⁵⁹ *Bassing v. Cady*, 208 U.S. 386, 28

S.Ct. 392, 52 L.Ed. 540, 13 Ann.Cas. 905.

⁶⁰ *Green v. State*, 147 Tenn. 299, 247 S.W. 84, 28 A.L.R. 842; *State v. Snyder*, 98 Mo. 555, 12 S.W. 369.

⁶¹ *Ex parte Bigelow*, 113 U.S. 328, 5 S.Ct. 542, 28 L.Ed. 1005; *Simmons v. United States*, 142 U.S. 148, 12 S.Ct. 171, 35 L.Ed. 968; *Thompson v. United States*, 155 U.S. 271, 15 S.Ct. 73, 39 L.Ed. 146; *Green v. State*, 147 Tenn. 299, 247 S.W. 84, 28 A.L.R. 842.

however, been held that the discharge of an accused before returning a verdict in a capital or felony case, without the accused's consent and in the absence of imperative necessity, prevents his subsequent trial for the same offense on the grounds of prior jeopardy.⁶² If a jury is discharged for failure to agree upon a verdict, or if a verdict is not obtained for any cause whatever, the accused is not deemed to have been in legal jeopardy.⁶³ An acquittal in a trial, even where the prosecution was commenced by a defective indictment, bars a subsequent trial for the same offense, and an unreversed judgment of conviction in such case would have the same effect.⁶⁴ If, however, a verdict against the accused is set aside on his own motion, or on appeal or writ of error taken by him, or if the judgment is arrested for any reason other than former jeopardy, the protection of former jeopardy does not attach because of said prosecution, in a subsequent trial for the same offense.⁶⁵ The question has frequently arisen whether an accused, who is acquitted of one offense but convicted of a lesser offense included within the former and who procures a reversal of that judgment, may validly be convicted of the former on a retrial. It has been held that he may be thus convicted.⁶⁶ But an acquittal or an unreversed conviction of a lesser offense included within a greater offense bars a subsequent trial and conviction of the latter,⁶⁷ as would an acquittal or unreversed conviction of the greater offense bar a subsequent trial and conviction of a lesser offense included within it.⁶⁸ Any attempt to impose a second punishment for a single offense, even as an incident to the correction of an erroneous and voidable sentence already executed, is pro-

⁶² *Ex parte Glenn*, C.C., 111 F. 257; *Cornero v. United States*, 9 Cir., 48 F.2d 69, 74 A.L.R. 797.

United States v. Jones, 5 Cir., 31 F. 725; *Sanders v. State*, 85 Ind. 318, 44 Am.Rep. 29.

⁶³ *United States v. Perez*, 9 Wheat. 579, 6 L.Ed. 165; *Harlan v. State*, 190 Ind. 322, 130 N.E. 413; *People v. Davis*, 233 Mich. 29, 206 N.W. 522; *Com. v. McCormick*, 130 Mass. 61, 39 Am.Rep. 423; *Dreyer v. People*, 188 Ill. 40, 58 N.E. 620, 59 N.E. 424, 58 L.R.A. 869.

⁶⁶ *Trono v. United States*, 199 U.S. 521, 26 S.Ct. 121, 50 L.Ed. 292, 4 Ann.Cas. 773; *Stroud v. United States*, 251 U.S. 15, 40 S.Ct. 50, 64 L. Ed. 317.

⁶⁷ *People v. McDaniels*, 137 Cal. 192, 69 P. 1006, 59 L.R.A. 578, 92 Am. St.Rep. 81; *State v. Mikesell*, 70 Iowa 176, 30 N.W. 474.

⁶⁴ *United States v. Ball*, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300.

⁶⁸ See *Com. v. Roby*, 12 Pick., Mass., 496.

⁶⁵ *United States v. Ball*, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300;

hibited by the double jeopardy provision of the Fifth Amendment.⁶⁹ It has also been held that a statute allowing the government an appeal from an acquittal violates it, and that a retrial of the accused would violate his rights thereunder.⁷⁰ The principles implicit in the decisions heretofore cited would apply in defining when an accused, who has been tried without a jury, has been subjected to legal jeopardy.

What Constitutes the Same Offense

The protection of constitutional prohibitions against double jeopardy applies only where the second prosecution or punishment is for the same offense as that for which a person has already been in legal jeopardy. The usual test of identity is whether the elements requisite to the existence of each are the same so that the evidence required to prove the one would also establish the other.⁷¹ If the facts set forth in the second indictment or information would, if proved, have warranted a conviction under the former indictment or information, the second offense is deemed the same as the first.⁷² This does not prevent the legislative creation of separate and distinct offenses growing out of the same transaction or course of conduct, but each must be so defined as to conform to the principle stated above.⁷³ The same act or course of conduct may sometimes constitute more than a single offense either against the same sovereign or against different sovereigns. Examples of the former are where the same act violates both some provision of the law governing the military forces of the United States and some other federal law, or where the same act violates both a local ordinance and a state statute. It has been held that an acquittal by a duly convened court-martial prevents a subsequent prosecution in the civil courts for the violation of a statute that made punishable the same conduct involved in the

⁶⁹ *Ex parte Lange*, 18 Wall. 163, 21 L.Ed. 872.

⁷⁰ *Kepner v. United States*, 195 U.S. 100, 24 S.Ct. 797, 49 L.Ed. 114, 1 Ann. Cas. 655. The due process clause of the Fourteenth Amendment is not violated by a statute giving the state a right to appeal from the rulings and decisions of the trial court on matters of law: *Palko v. State of Connecticut*, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288.

⁷¹ *Morgan v. Devine*, 237 U.S. 632, 35 S.Ct. 712, 59 L.Ed. 1153.

⁷² *Tritico v. United States*, 5 Cir., 4 F.2d 664; *Goetz v. United States*, 5 Cir., 39 F.2d 903; *Scalf v. Commonwealth*, 195 Ky. 830, 243 S.W. 1034; *State v. Switzer*, 65 S.C. 187, 43 S.E. 513.

⁷³ *Krench v. United States*, 6 Cir., 42 F.2d 354; *Ex parte Nielson*, 131 U.S. 176, 9 S.Ct. 672, 33 L.Ed. 118.

court-martial proceedings.⁷⁴ The reason given was that the laws making that conduct punishable had the same ultimate source. That reasoning would require the same conclusion where the same act violates both a local ordinance and a state law. It is because the laws do not have the same ultimate source that former jeopardy in a state criminal proceeding is no defense against a subsequent prosecution by the federal government for the same act which violated both a state and a federal statute,⁷⁵ and that former jeopardy in a federal criminal trial is no defense against a state prosecution for the same act under such circumstances.⁷⁶ Questions of the foregoing character can, of course, arise only where the situations would involve identity of offense, as heretofore defined, if both prosecutions or punishments were under the authority of the same government. The prohibition against double jeopardy prohibits legislation imposing more than a single punishment for the same offense, but it does not prevent imposing both fines and civil penalties for the same act.⁷⁷ Nor does it prevent Congress from punishing a person for being in contempt of its authority, and also making such conduct a misdemeanor.⁷⁸ It has been stated that, where conduct constitutes a crime against the law of nations punishable by any nation, a plea of prior conviction thereof under the authority of one nation would bar a prosecution by another for the same offense.⁷⁹ The plea of former jeopardy can be invoked by one only if he himself has already been in jeopardy with respect to a given offense. Hence a corporation charged with making a fraudulent income tax return cannot plead a former acquittal of its officers on a charge involving the same return.⁸⁰ The problem of the extent to which the doctrine of *res judicata* applies in criminal proceedings depends on other considerations than those involved in the problem of

⁷⁴ *Grafton v. United States*, 206 U. S. 333, 27 S.Ct. 749, 51 L.Ed. 1084, 11 Ann.Cas. 640; but see *United States v. Clark, C.C.*, 31 F. 710, and *In re Fair, C.C.*, 100 F. 149.

⁷⁵ *United States v. Barnhart, C.C.*, 22 F. 285; *UNITED STATES v. LANZA*, 260 U.S. 377, 43 S.Ct. 141, 67 L.Ed. 314, *Black's Cas. Constitutional Law*, 2d, 693.

⁷⁶ *Moore v. Illinois*, 14 How. 13, 14 L.Ed. 306; *Hebert v. State of*

Louisiana, 272 U.S. 312, 47 S.Ct. 103, 71 L.Ed. 270, 48 A.L.R. 1102.

⁷⁷ *Helvering v. Mitchell*, 302 U.S. 391, 58 S.Ct. 630, 82 L.Ed. 917.

⁷⁸ *In re Chapman*, 166 U.S. 661, 17 S.Ct. 677, 41 L.Ed. 1154.

⁷⁹ *United States v. Furlong*, 5 Wheat. 184, 5 L.Ed. 64.

⁸⁰ *Pankratz Lumber Co. v. United States*, 9 Cir., 50 F.2d 174.

former jeopardy, and its consideration is outside the purview of this text.⁸¹

State Prosecutions

The foregoing discussion has dealt with the problem of double jeopardy as defined for the federal government by the Fifth Amendment to the federal Constitution, and as defined for states by equivalent provisions in their respective constitutions. It is only necessary to add that no provision of the federal Constitution has thus far been held to prevent a state from subjecting one to more than a single jeopardy for the same offense. The Supreme Court has, however, discussed the issue.⁸²

PUNISHMENT FOR CRIME

329. The Eighth Amendment to the federal Constitution prohibits the infliction of cruel and unusual punishments. The constitutions of most of the states contain a similar provision.

Cruel and Unusual Punishments

The prohibition of the Eighth Amendment to the federal Constitution applies only to the United States.⁸³ The due process clause of the Fourteenth Amendment does not prohibit a state from inflicting cruel and unusual punishments for crime,⁸⁴ nor has any other provision of the federal Constitution been construed to so limit the states in this field. The constitutions of practically all the states contain a similar provision. There have been but few decisions construing this provision of the Eighth Amendment. It has been held violated by a statute punishing the falsification of public records by a public official by a fine and imprisonment for a long term of years during which the prisoner was required to wear a chain suspended from his wrist to his ankle, and adding deprivation of civil and political rights during the remainder of his life.⁸⁵ The state decisions construe state constitutional provisions to prohibit only

⁸¹ See *Coffey v. United States*, 116 U.S. 436, 6 S.Ct. 437, 29 L.Ed. 684; *United States v. Oppenheimer*, 242 U.S. 85, 37 S.Ct. 68, 61 L.Ed. 161, 3 A.L.R. 516.

⁸² *Palko v. State of Connecticut*, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288.

⁸³ *O'Neil v. State of Vermont*, 144 U.S. 323, 12 S.Ct. 693, 36 L.Ed. 450.

⁸⁴ *In re Kemmler*, 136 U.S. 436, 10 S.Ct. 930, 34 L.Ed. 519.

⁸⁵ *Weems v. United States*, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793, 19 Ann.Cas. 705.

barbarous methods of punishment, but not such customary punishments as fines, imprisonment, deprivation of civil and political rights, or death.⁸⁶ The federal Supreme Court has held death by electrocution not a cruel punishment.⁸⁷ It has been held that a state constitutional provision against such punishments may be violated by the keeper of a prison subjecting a prisoner, without just cause, to a form of punishment not provided for in his sentence.⁸⁸ Statutes permitting the imposition of a heavier punishment on a second or third conviction of crime do not inflict cruel punishment in the constitutional sense.⁸⁹

Other Limitations

The federal Constitution contains no specific limitations upon the amount and kind of punishment that a state may inflict upon those convicted of crime, nor, as already stated, have any of its broad general provisions been construed to limit a state in this respect. The equal protection clause of the Fourteenth Amendment would prevent a state from making arbitrary discriminations in this field, but a statute that defines the term of imprisonment for an escape from prison by the term being served at the time of the escape establishes a reasonable and valid classification of punishments,⁹⁰ as does one that imposes the death penalty upon lifers convicted of assault with intent to kill and a lesser penalty upon other prisoners convicted thereof.⁹¹ It has also been held that the due process clause of the Fourteenth Amendment confers upon a prisoner, convicted of murder committed during an attempted escape, no right to serve out his prior sentence before executing him for that murder.⁹²

⁸⁶ See *Wilson v. State*, 28 Ind. 393; *Foot v. State*, 59 Md. 264; *People v. Kemmler*, 119 N.Y. 580, 24 N.E. 9.

⁸⁷ *In re Kemmler*, 136 U.S. 436, 10 S.Ct. 930, 34 L.Ed. 519 (case involved question under Fourteenth Amendment, U.S.C.A.Const.).

⁸⁸ *Howard v. State*, 28 Ariz. 433, 237 P. 203, 40 A.L.R. 1275.

⁸⁹ *McDonald v. Commonwealth of Massachusetts*, 180 U.S. 311, 21 S.Ct.

389, 45 L.Ed. 542 (case did not involve Eighth Amendment, U.S.C.A. Const.).

⁹⁰ *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 58 S.Ct. 59, 82 L. Ed. 43.

⁹¹ *Finley v. People of State of California*, 222 U.S. 28, 32 S.Ct. 13, 56 L. Ed. 75.

⁹² *Kelley v. State of Oregon*, 273 U.S. 589, 47 S.Ct. 504, 71 L.Ed. 790.

TREASON

330. Section 3 of Article 3 of the federal Constitution provides that "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort", and that "No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

331. The same Section confers upon Congress the power to declare the punishment for treason, but provides that "no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted."

Definition of Treason

Treason is a breach of allegiance, and an alien domiciled within the United States owes it a temporary allegiance and hence can be guilty of treason against it with respect to acts while so domiciled therein.⁹³ It is the only offense against the United States which the Constitution has itself defined. This fact deprives Congress of power to either limit or extend its meaning, and its sole power in the premises is to prescribe the punishment for treason within the constitutionally prescribed limits.⁹⁴ It is necessary to the commission of treason that war be actually levied against the United States, and a mere conspiracy to wage war against it is not treason, nor does the actual enlistment of men to serve against the United States amount to levying war against it. Though there must be an actual assemblage for the purpose of effecting a treasonable purpose in order that there be a levying of war, one may be guilty of treason though not a member of such assemblage if he has taken any part, however minute or however remote from the scene of action, in bringing it about.⁹⁵ A purpose to overthrow the government, or to prevent its enforcement of its laws generally rather than in a single case, is a treasonable purpose.⁹⁶ There is a second branch of treason which consists in adhering to, and giving aid and comfort to, the enemies of the United States.

⁹³ Carlisle v. United States, 16 Wall. 147, 21 L.Ed. 426.

⁹⁴ United States v. Fries, 3 Dall. 515, 1 L.Ed. 701; United States v. Greathouse, Fed.Cas.No.15,254.

⁹⁵ Ex parte Bollman, 4 Cranch 75,

2 L.Ed. 554; United States v. Burr, Fed.Cas.No.14,692; United States v. Hanway, Fed.Cas.No.15,299.

⁹⁶ United States v. Fries, 3 Dall. 515, 1 L.Ed. 701; United States v. Mitchell, Fed.Cas.No.15,788.

To constitute this, the accused must be guilty of some act having for its direct aim the furtherance of the enemy's designs while a state of war exists,⁹⁷ and mere expressions of opinion indicative of sympathy with the enemy's purposes are not sufficient.⁹⁸ The Congress may, of course, provide for the punishment of acts hostile to the interests of the United States that fall short of the constitutional definition of treason.

Mode of Proof

The Constitution prohibits the conviction of any person of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.⁹⁹ A confession made out of court furnishes no basis for a conviction even though proved by two witnesses.¹

Punishment for Treason

Congress is specifically authorized to prescribe the punishment for treason. Its power is, however, limited by the provision that no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted. The limitation was imposed to protect the interest of the children and heirs of the attainted person. The latter provision prevents the confiscation of the attainted person's realty for a longer period than the term of his natural life.²

SUSPENSION OF THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS

332. Section 9 of Article 1 of the federal Constitution provides that "the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." The constitutions of many of the states contain a similar provision.

The purpose of the writ of habeas corpus is to inquire into the reasons for which a person is being detained or deprived of his liberty in order to determine its legality. It is an im-

⁹⁷ *Hanauer v. Doane*, 12 Wall. 342, 20 L.Ed. 439.

¹ *United States v. Fries*, 3 Dall. 515, 1 L.Ed. 701.

⁹⁸ *United States v. Herberger*, D.C., 272 F. 278.

² See *Bigelow v. Forrest*, 9 Wall. 339, 19 L.Ed. 696; *Miller v. United States* (Page v. United States), 11 Wall. 268, 20 L.Ed. 135.

⁹⁹ See *United States v. Mitchell*, Fed.Cas.No.15,788.

portant instrument for the judicial protection of personal liberty. The purpose of the constitutional provision was both to preserve the privilege and yet prevent its use to interfere with the government's power to protect the national interests when threatened by rebellion or invasion. The suspension of the privilege of the writ does not deprive the courts of power to issue it, but merely denies the person detained the privilege of obtaining his liberty by its use.³ The power to suspend the privilege is now recognized as vested exclusively in Congress; the President has no power to do so without its authorization.⁴

³ See discussion in *Ex parte Milligan*, 4 Wall. 2, 18 L.Ed. 281.

⁴ *Ex parte Bollman*, 4 Cranch 75, 2 L.Ed. 554; *Ex parte Milligan*, 4 Wall. 2, 18 L.Ed. 281.

CHAPTER 21

LIMITATIONS UPON CIVIL AND ADMINISTRATIVE PROCEDURE

- 333. General Considerations.
- 334. General Procedural Requisites Based on Due Process.
- 335-337. Extent to which Due Process Requires Judicial Decision.
- 338. Due Process and the Jurisdiction of Courts.
- 339-340. Jury Trials in Civil Cases.

GENERAL CONSIDERATIONS

333. The enforcement of governmental policies is effected not only by punishing violations of the laws that define those policies, but also by imposing and enforcing other sanctions in order to insure that conduct shall conform to the rules and standards legally prescribed. The principal constitutional limitations upon the procedures that may be employed in this process are, in the case of the federal government, the due process clause of the Fifth Amendment, and the Seventh Amendment; and, in the case of the states, they are the due process clause of the Fourteenth Amendment, together with the due process and jury trial provisions of the respective state constitutions.

The preceding chapter has discussed the various constitutional limitations imposed upon the governments of our system in enforcing their respective policies by punishing those who violate the law defining those policies. The present chapter will consider the constitutional limitations upon their enforcement of those policies by other methods and sanctions. These include not only administrative proceedings and the resort of executive and administrative agencies to civil proceedings to enforce the law with the execution of which they are charged, but also civil proceedings between private parties by means of which governments aim to peaceably adjust private controversies in accordance with law. The enforcement process, whatever its specific form, is in the final analysis a method for applying a given rule of law to a particular case within its terms and enforcing therein whatever legal consequences are prescribed.¹ These consequences may be of various sorts such as

¹ The exercise by executive or administrative officials or boards of a rule making power conferred upon them by legislation is not a part of

a judgment for damages against a party to the proceeding, an order requiring him to do, or refrain from doing, certain acts, or the grant or denial to him of a license to engage in an occupation. They may thus be either detrimental or advantageous to him, although the greater part, but not all, of the law dealing with constitutional limitations upon enforcement procedures has been developed through cases brought before the courts by those against whom particular rules of law have been applied to their disadvantage. The application of a rule of law in a given case inevitably involves a decision on the part of some governmental authority that the case is within its terms. This decision requires that authority to explicitly or implicitly make several subordinate determinations. It must (1) determine that the rule can be constitutionally applied to the case in question; (2) ascertain the facts upon the existence of which the rule conditions the enforcement of the consequences sought to be enforced in such case; and (3) determine that those facts exist therein. The first and second of these call for decisions on matters of law while the third calls for a decision on a question of fact. It is patent that the interests of society demand that legal controversies be finally terminated at some time and be not allowed to continue indefinitely. This requires that the final decision on all of the foregoing matters be lodged with someone authorized to reach it in some proceeding conducted in accordance with some form of procedure. The present chapter will consider the constitutional requisites of this process. The only specific federal constitutional provision bearing on this matter is that of the Seventh Amendment which preserves the right of jury trial in suits at the common law where the value in controversy exceeds twenty dollars, and provides that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law. This provision applies only to trials in courts established under the authority of the United States. The most important and far reaching restrictions upon the enforcement of law by other than, as well as by, criminal proceedings are those based, in the case of the federal government, upon the due process clause of the Fifth Amendment, and, in the case of the states, upon the due process clause of the Fourteenth Amendment and similar clauses in the constitutions of the

their enforcement activities within the meaning of that concept as used in the present chapter, but their en-

forcement in particular cases of a rule promulgated by them in the exercise of that power is such.

several states. The fundamental ideas that have been used to develop the procedural limitations in this field are implicit in the conception of due process, and have been practically the same for all these various due process clauses. The subsequent treatment will, accordingly, discuss the requisites of due process without reference to the particular due process clause involved in the cases considered.

GENERAL PROCEDURAL REQUISITES BASED ON DUE PROCESS

334. The procedural requirements of due process are not the same for all proceedings. There are, however, certain fundamental conditions that it requires to be observed regardless of the particular form or purpose of the proceeding. These are that a tribunal, whether a court or executive or administrative official or board, shall not be authorized to make a final decision on any matter of fact or law on which a person's legal rights or liabilities depend unless the procedure provides for giving him notice and an opportunity for a full and fair hearing thereon. The question whether a person has been accorded these constitutional rights depends upon whether the entire process for the decision of such issues affords them, not on whether every separate part thereof conforms to the requisite standard.

Notice and Hearing

The application to a given case of a rule of law under which a person's legal rights or liabilities depend upon the existence of certain facts or conditions involves decisions by some authority of the kind already described. Due process generally imposes restrictions upon the process of reaching final decisions on those matters irrespective of whether the power to make them is vested in a court, an administrative board, or an executive official. It clearly requires that the tribunal empowered to make any such decision shall be fair and impartial and competent to afford an adequate hearing.² This does not, however, require that the members of such tribunal shall be free from even a remote and indirect interest in the results of the decision, although where that interest is immediate and direct the same rule would apply that prevails in the case of criminal

² Ex parte Nelson, 251 Mo. 63, 651, 56 L.Ed. 1038. Compare Brinkley v. Hassig, 10 Cir., 83 F.2d 351. See also Jordan v. Massachusetts, 225 U.S. 167, 32 S.Ct.

proceedings.³ It has, accordingly, been held that an owner of property assessed for a special improvement is not denied due process merely because all the members of the board making the assessment were resident taxpayers of the town and two of them owners of property assessable for the improvement.⁴ A person adjudged guilty of contempt of court by a judge who had reached his decision, and written his opinion in support thereof, before the accused was heard, is denied due process by being deprived of a hearing before a fair and impartial tribunal.⁵ The fundamental character of this right is so generally recognized that few cases have been found in which it has been held violated. Its ultimate purpose is to insure an opportunity for a fair hearing to one whose legal position will be affected by the decision. This is also the real basis for the almost universal holding that due process requires that notice and an opportunity to be heard be accorded such person.⁶ The character and amount of notice depend upon the nature of the proceeding. Thus a taxpayer the amount of whose tax depends upon the value of his property is not entitled to actual and specific notice of the proceedings in which the assessors fix that value, but due process is satisfied by statutory notice of the time and place of their meeting for its final determination.⁷ On the other hand, a mere statutory notice of the times and places for holding a court would not satisfy the requirement for notice to a defendant sued in such court. In the former case every property owner would know that a decision as to the value of his property would be made even if it consisted of nothing more than a confirmation of an assessment already made; in the latter no particular person would be expected to know from the mere knowledge of the time and place of sessions of the court that a matter involving his interests would come before it. It is because some courts have in effect deemed the posi-

³ See *Tumey v. State of Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749, 50 A.L.R. 1243.

⁴ *Hibben v. Smith*, 191 U.S. 310, 24 S.Ct. 88, 48 L.Ed. 195.

⁵ *Ex parte Nelson*, 251 Mo. 63, 157 S.W. 794.

⁶ *State ex rel. Thompson v. District Court of Thirteenth Judicial Dist. in and for Carbon County*, 75 Mont. 147,

242 P. 959. *United States ex rel. Turner v. Fisher*, 222 U.S. 204, 32 S.Ct. 37, 56 L.Ed. 165.

⁷ *HAGAR v. RECLAMATION DIST. NO. 108*, 111 U.S. 701, 4 S.Ct. 663, 28 L.Ed. 569, *Black's Cas. Constitutional Law*, 2d, 697; *Yuma County v. Arizona & S. R. Co.*, 30 Ariz. 27, 243 P. 907. See also *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 45 S.Ct. 491, 69 L.Ed. 953, for a general discussion of this matter.

tion of an individual taxpayer with respect to the activities of equalization boards similar to that of the defendant in the second example that they have construed due process to require specific notice to him before such boards can raise his assessment except as part of a general and uniform increase in the valuation of all property within their jurisdiction.⁸ Regardless, however, of what particular method of giving notice will satisfy due process, it must be adequate and given within a reasonable time in advance of the hearing. Hence notice to the attorneys of Indians seeking to be restored to the rolls of freedmen, given a few hours before the hearing of a motion to strike their names therefrom on the grounds that their enrolment had been procured by perjury, was held not to meet the requirements of due process.⁹ Adequate notice is, however, not denied by a statute providing for the judicial review of orders of a public service commission which requires the parties to a proceeding before such commission to keep themselves informed and to take notice, without formal notification, of further proceedings which may ensue for reviewing the commission's decision, since the review proceedings are deemed part of the original proceedings before the commission.¹⁰ Some of the implications of that theory may well be held to transgress the requirements of due process.

Notice is not always necessary in order that a procedure conform to due process. The purpose for requiring notice is to enable a person to be present to protect his interests which may be affected in the proceedings. If these involve no such interest, no fundamental purpose would be served by giving him notice and due process does not require any to be given him. A judgment debtor is not, therefore, entitled by due process to notice of supplemental proceedings to execute the judgment.¹¹ Decisions to this effect are also frequently supported on the basis that notice of the proceeding in which the judgment was rendered is adequate

⁸ *Beveridge v. Baer*, 59 S.D. 563, 241 N.W. 727, 84 A.L.R. 189; contra, *Shell Petroleum Corporation v. State Board of Equalization*, 170 Okl. 581, 41 P.2d 106.

⁹ *United States ex rel. Turner v. Fisher*, 222 U.S. 204, 32 S.Ct. 37, 56 L.Ed. 165; see also *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 45 S.Ct. 491, 69 L.Ed. 953.

¹⁰ *State ex rel. Anderson Motor Service Co., Inc. v. Public Service Commission*, 339 Mo. 469, 97 S.W.2d 116. See also *Rosandich v. Chicago, N. S. & M. R. Co.*, 185 Wis. 184, 201 N.W. 391.

¹¹ *Endicott Johnson Corporation v. Encyclopedia Press, Inc.*, 266 U.S. 285, 45 S.Ct. 61, 69 L.Ed. 288.

notice of any proceedings given by law for its enforcement.¹² It has also been held that a statute permitting a court to enter judgment upon an award of a workmen's compensation board, without notice thereof to the employer against whom the award had been made, does not deny the latter due process if the compensation act is an optional one since the parties are deemed to have consented to such procedure by electing to come under the act providing for such procedure.¹³ The court, however, reinforced its decision by invoking the theory that notice of the proceedings before the commission in which the award was made was adequate notice of subsequent judicial proceedings for enforcing the award. There have, however, been some decisions denying the necessity for notice and an opportunity to be heard on a matter the decision on which affected an interest of person or property of the person denied them. This is consistent with due process in any case if the decision of the official empowered to make it without notice and an opportunity to be heard being accorded the person to be affected thereby is not final but reviewable in proceedings of some kind of which such person is entitled to notice and in which he is entitled to be heard on that same matter. Thus a procedure for determining the compensation to be awarded for private property taken for a public use, under which the board making the award was not required to grant property owners a hearing on that matter, does not violate due process where property owners are given a reasonable time to appeal from the board's decision to a court authorized to review the award.¹⁴ It is on the same theory that licenses to engage in a business or profession may be summarily revoked without a hearing where the official's action is subject to judicial review by a trial de novo.¹⁵ The opinion in *Brein v. Connecticut Eclectic Examining Board*¹⁶ intimated that the temporary suspension of the right to engage in the

¹² *Ayres v. Campbell*, 9 Iowa 213, 74 Am.Dec. 346; *Foster v. Young*, 172 Cal. 317, 156 P. 476.

¹³ *Rosandich v. Chicago*, N. S. & M. R. Co., 185 Wis. 184, 201 N.W. 391.

¹⁴ *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 45 S.Ct. 491, 69 L.Ed. 953; see for a case in which the character of the only available method of review was held inadequate, *Southern R. Co. v. Common-*

wealth of Virginia, 290 U.S. 190, 54 S.Ct. 148, 78 L.Ed. 260; *State v. Maguire*, 109 Minn. 88, 122 N.W. 1120.

¹⁵ *Brein v. Connecticut Eclectic Examining Board*, 103 Conn. 65, 130 A. 289.

¹⁶ *Brein v. Connecticut Eclectic Examining Board*, 103 Conn. 65, 130 A. 289.

business or profession during the interval between the revocation of the license and the final decision of the court thereon would not deny due process though based on a proceeding at which the licensee had not been afforded an opportunity to be heard. A statute authorizing a suspension of a license without notice and hearing but permitting the licensee to demand a hearing within a stated time has been held consistent with due process.¹⁷ It is, however, the general, but not universal, holding that due process requires that notice and opportunity for hearing be accorded if finality is given to the decision of an official or board on a given matter on which a person's legal position depends. It has, accordingly, been held that a board's order fixing railroad rates could not, consistently with due process, be made final where no provision was made giving the affected railroads a right to be heard thereon, and that such railroads were entitled to a judicial review of such rates.¹⁸ The same principle underlies the decisions that hold that due process requires notice and an opportunity to be heard be accorded to licensees before revoking their licenses to pursue a business or profession, the pursuit of which cannot be completely prohibited.¹⁹ The effect of a failure to accord them that right is to invalidate the revocation of their licenses. These cases involved procedures that differed from the case mentioned above in not providing adequate corrective review proceedings.

There are, however, instances in which legislation has been sustained which imposed certain consequences if specified facts or conditions existed and which entrusted the final decision as to their existence to an executive or administrative official or board authorized to reach a decision thereon without notice or an opportunity to be heard being accorded the person on whom those consequences were to be visited. A federal statute prohibited steamship companies from bringing into the United States any alien affected with certain specified diseases, and authorized executive officials to impose upon them a penalty for so doing if it should appear to the satisfaction of a designated official that the alien was afflicted with such a disease at the

¹⁷ *Halsey, Stuart & Co. v. Public Service Commission*, 212 Wis. 184, 248 N.W. 458.

¹⁸ *Chicago, M. & St. P. R. Co. v. State of Minnesota*, 134 U.S. 418, 10 S.Ct. 462, 33 L.Ed. 970.

¹⁹ *Smith v. State Board of Medical*

Examiners, 140 Iowa 66, 117 N.W. 1116; *Northern Cedar Co. v. French*, 131 Wash. 394, 230 P. 837; *Angelopoulos v. Bottorff*, 76 Cal.App. 621, 245 P. 447; *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117, 46 S.Ct. 215, 70 L.Ed. 494.

time of his foreign embarkation and that the existence of such disease might have been detected by a competent medical examination at such time. This statute was construed as not requiring the steamship companies to be granted an opportunity to be heard "in the sense of raising an issue and tendering evidence" as to the condition of the alien immigrant upon arrival at the point of disembarkation. It was held that this denial to them of that right did not violate due process even though the steamship companies would thus be subjected to a penalty by the decision of an official not required to accord them a hearing on a matter on the existence of which the imposition of the penalty was conditioned.²⁰ The same decision has been made as to a provision denying an importer of tea a right to be heard on the question of whether his tea met the legislatively prescribed standard entitling it to be imported.²¹ The Supreme Court in both instances supported its decisions by reliance upon the plenary power of Congress over the admission of aliens and the importation of goods into the United States. This theory is very similar to that on which state courts have sustained the revocation, without notice and an opportunity to be heard, of a person's license to engage in a business which a state might validly entirely prohibit.²² The fact that the statute or ordinance under which a license is granted expressly makes a license revocable at the will of designated officials, or reserves a right to do so without notice and hearing, is sometimes made the basis for sustaining a revocation made without notice and hearing as not a denial of due process.²³ The correctness of such decisions in the case of a business or profession which may not be completely prohibited is questionable, and provisions of statutes or ordinances making licenses to engage therein subject to such conditions would seem to impose an arbitrary and unconstitutional condition upon the right to pursue such business or calling. If, however, the business is one that might validly be absolutely prohibited, the legislative body's right to confer upon

²⁰ *Oceanic Steam Nav. Co. v. Stranahan*, 214 U.S. 320, 29 S.Ct. 671, 53 L.Ed. 1013. See *Lloyd Sabaudo Societa Anonima Per Azioni v. Elting*, 287 U.S. 329, 53 S.Ct. 167, 77 L.Ed. 341, for a later discussion and interpretation of the statute involved in the case first cited.

²¹ *Buttfield v. Stranahan*, 192 U.S. 470, 24 S.Ct. 349, 48 L.Ed. 525.

²² *Bungalow Amusement Co. v. City of Seattle*, 148 Wash. 485, 269 P. 1043; *Com. v. Kinsley*, 133 Mass. 578; *State v. Cote*, 122 Me. 450, 120 A. 538; *La Plante v. State Board of Public Roads*, 47 R.I. 258, 131 A. 641.

²³ *Com. v. Kinsley*, 133 Mass. 578; *State v. Cote*, 122 Me. 450, 120 A. 538; *Burgess v. City of Brockton*, 235 Mass. 95, 126 N.E. 456.

an official or board the discretion to revoke the license without notice and hearing might be justified on the theory that there is nothing requiring a hearing since no one has a right to any particular exercise of a validly conferred discretionary power. The foregoing discussion has been concerned only with the executive or administrative application of legal rules and standards to particular cases. No notice and hearing need be given those affected by an exercise of a purely legislative power such as the enactment of a rate ordinance, or the exercise of a rule-making power by an executive or administrative officer or board.²⁴ It would be only when such rates or rules were sought to be enforced in particular cases that the question of notice and hearing would arise. It should also be noted that the mere fact that notice and hearing may be validly dispensed with in certain cases of executive or administrative enforcement of law does not mean that decisions so arrived at are immune from successful attack. Due process requires the determinations to be fairly and honestly made even in such cases, although it is generally more difficult to establish a departure from the requisite standard than where a fair hearing is required with respect to the matter decided.²⁵ Statutes frequently provide for a hearing where constitutional requirement would be satisfied without one.²⁶

What Included in Right to a Hearing

The purpose of requiring a hearing to be accorded the person against whom a given rule of law is being enforced is to enable him to present any matter of law or fact that bears upon the existence of his liability. It is thus the most important single requisite to giving him the fair trial to which due process entitles him. The elements that have been held included in this right have been determined by reference to their relation to the ultimate objective of insuring a fair trial and a decision in accordance with the law and the facts of the given case. It is almost universally held that it includes the right to be repre-

²⁴ See *Home Telephone & Telegraph Co. v. City of Los Angeles*, 211 U.S. 265, 29 S.Ct. 50, 53 L.Ed. 176; *Buttfield v. Stranahan*, 192 U.S. 470, 24 S.Ct. 349, 48 L.Ed. 525.

²⁵ See *Lloyd Sabaudo Societa Anonima Per Azioni v. Elting*, 287 U.S. 329, 53 S.Ct. 167, 77 L.Ed. 341.

²⁶ For a discussion of the distinctions between situations in which due process requires a hearing and those in which it is a merely statutory right, see *Sharkey v. Thurston*, 268 N.Y. 123, 196 N.E. 766.

sented by counsel of one's own choosing.²⁷ This exists both when the proceedings are judicial²⁸ and when they are before an executive or administrative officer or board.²⁹ The denial of the right to an alien seeking admission to the United States has been held to deny him due process.³⁰ The right is not infringed merely because an alien being held for deportation had no counsel when first examined but had the advice and assistance of counsel in the subsequent stages of the proceedings before the hearings were ended and the order of deportation made.³¹ It is infringed where a court permits a party to be heard through counsel of his own selection only by permission of and in subordination to counsel not of his own choice who constantly opposed counsel selected by him, or where he is represented by counsel appointed by the court against his wishes.³² No case has been found holding that a court, or any other tribunal, is required by due process to appoint counsel for those unable to procure one for themselves. A more fundamental element in the right to be heard is the right to be advised of the claims of the opposing party whether that be a private person or the public itself, and to be given a reasonable opportunity to meet them or defend himself against them.³³ It was because this requirement was violated that due process was held denied a party whose rates were fixed by the Secretary of Agriculture after proceedings in which such party was afforded no opportunity to discover the specific findings against him until served with the final order therein.³⁴ The Court stated that the requirements of fairness extended to the concluding parts of the procedure as well as to their beginning and

²⁷ *Cooke v. United States*, 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 767; *Roberts v. Anderson*, 10 Cir., 66 F.2d 874.

²⁸ *Cooke v. U. S.*, 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 767.

²⁹ *Miers v. Brownlow*, D.C., 21 F. 2d 376.

³⁰ *Miers v. Brownlow*, D.C., 21 F. 2d 376.

³¹ *Low Wah Suey v. Backus*, 225 U.S. 460, 32 S.Ct. 734, 56 L.Ed. 1165.

³² *Roberts v. Anderson*, 10 Cir., 66 F.2d 874.

³³ *Cooke v. United States*, 267 U.S.

517, 45 S.Ct. 390, 69 L.Ed. 767; *MORGAN v. UNITED STATES*, 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129, Black's Cas. Constitutional Law, 2d, 708. See also *Bar Ass'n of City of Boston v. Sleeper*, 251 Mass. 6, 146 N. E. 269, holding it violative of due process to disbar an attorney on the basis of a charge not contained in the complaint against him.

³⁴ *MORGAN v. UNITED STATES*, 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129, Black's Cas. Constitutional Law, 2d, 708. See *American Telephone & Telegraph Co. v. United States*, D.C., 14 F.Supp. 121, for a situation in which such findings were held not to be required.

intermediate steps. There could be no fair hearing or trial unless the party whose conduct is sought to be regulated by the proceedings were permitted to introduce evidence in support of his position on the issues involved. Due process confers such right upon him, and this includes the right of calling witnesses and to have them testify.³⁵ This right would be useless but for the duty of those charged with making the decision to consider the evidence in arriving at their decision.³⁶ This is a part of the right of a party to have the case decided on the basis of the evidence presented at the hearing, but includes also a right to have it based only on evidence so presented. It has, accordingly, been held that due process is violated by an administrative board's order requiring a utility to refund rates previously collected where the order was based upon information secretly collected by the board and never disclosed.³⁷ The same principle invalidates a conviction of contempt based in part upon evidence never introduced at the trial but heard by the court in another proceeding to which the convicted person was not a party.³⁸ The ultimate basis of these decisions is that the procedure therein condemned deprived the party being tried of an opportunity to make a proper defense and of the right to test the evidence against him.³⁹ It is, however, generally held that due process is not denied a person in an administrative proceeding by the board's lack of power to compel the attendance of witnesses,⁴⁰ and it is clearly not denied where the statute, though not conferring such power upon a board, has provided a compulsory method for the taking of depositions.⁴¹ The right to

³⁵ *Georgia Ry. & Electric Co. v. Decatur*, 295 U.S. 165, 55 S.Ct. 701, 79 L.Ed. 1365; *Cooke v. United States*, 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 767; *Chin Yow v. United States*, 208 U.S. 8, 28 S.Ct. 201, 58 L.Ed. 369.

³⁶ *Railroad Commission of California v. Pacific Gas & Electric Co.*, 302 U.S. 388, 58 S.Ct. 334, 82 L.Ed. 319.

³⁷ *Ohio Bell Tel. Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292, 57 S.Ct. 724, 81 L.Ed. 1093. See also *Baltimore & O. R. Co. v.*

United States, 264 U.S. 258, 44 S.Ct. 317, 68 L.Ed. 667.

³⁸ *People v. McKinlay*, 367 Ill. 504, 11 N.E.2d 933.

³⁹ See *Bratton v. Chandler*, 260 U.S. 110, 43 S.Ct. 43, 67 L.Ed. 157.

⁴⁰ *Low Wah Suey v. Backus*, 225 U.S. 460, 32 S.Ct. 734, 56 L.Ed. 1165; *Brinkley v. Hassig*, 130 Kan. 874, 289 P. 64; contra, *Jewell v. McCann*, 95 Ohio St. 191, 116 N.E. 42.

⁴¹ *State of Missouri ex rel. Hurwitz v. North*, 271 U.S. 40, 46 S.Ct. 384, 70 L.Ed. 818.

support one's position by argument is another element in the right to be heard conferred by due process.⁴²

The right to a hearing in accordance with these principles extends to every matter on which liability depends, but this does not necessarily require that it be before a single official or tribunal with respect to all such matters. Due process does not prohibit a procedure under which the final decision on matters of law on which liability depends is made by a tribunal other than that authorized to make final decisions on matters of fact on which it depends, but in fact requires it in some cases. It is, however, essential to due process that a person be given a full and fair hearing on any matter on which his liability depends, whether that be matter of law or fact, before the official or tribunal authorized to make the final determination of such matter of law or fact. A taxpayer who was accorded a hearing before a board of arbitration on the value of his property was nevertheless held to have been denied due process where the final decision thereon was made by an assessor before whom he was not, under the statute, entitled to be heard.⁴³ In another case charges were made against an attorney to which he filed an answer. The charges were heard before a commissioner appointed by the court with which the commissioner's findings and recommendations were filed. The accused filed exceptions thereto with the court which, without according the attorney any hearing thereon, entered an order suspending the accused from practice and denied him all further relief. This procedure was held to deny the accused due process since it at no stage accorded him an opportunity to be heard on the merits before the court which made the final decision on his legal rights. The theory that the hearings before the commissioner constituted a hearing before the court was rejected.⁴⁴ It is clear that the procedure would have been valid if that theory had been accepted. There are many administrative proceedings in which the actual hearing is before representatives of a department charged with the enforcement of a statute while the ultimate decision is made by the department head on the basis of the record made at the hearing. It has never been held that a procedure of that character violates due process merely because the actual hearing of the testimony is before represen-

⁴² See *MORGAN v. UNITED STATES*, 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129, Black's Cas. Constitutional Law, 2d, 708.

⁴³ *Turner v. Wade*, 254 U.S. 64, 41 S.Ct. 27, 65 L.Ed. 134.

⁴⁴ *In re Noell*, 8 Cir., 93 F.2d 5.

tatives of those charged with the ultimate decision. If the person whose interests are being determined has been accorded a fair hearing before those representatives, and if the department head is required to decide the matter on the basis of the record at that hearing, and if the person involved is permitted by briefs or otherwise to present his position before such head, due process is satisfied. If, however, such party is denied an adequate opportunity to present his position to such department head, due process is deemed to have been denied him. This occurs when he has never been accorded an opportunity to do so because never informed of the precise charges or claims of the opposite party on which the department head was to finally decide, since such procedure deprives the party of an adequate opportunity to present his side of the case to the person authorized to make the final decision.⁴⁵ This matter has seldom been before the courts because in most of the situations in which this divided form of administrative action is used adequate provision is made for a fair hearing.

Regulating Right to a Hearing

The right to a fair hearing may be subjected to reasonable regulation. The law of evidence is in substance no more than that. The same is true of statutes of limitation since these in effect regulate the period within which a person is required to demand the hearing on a matter involving his legal rights to which due process entitles him, whether it be in a court or other tribunal. The validity of these is almost universally sustained when they do not destroy rights of action already vested. The present discussion will, however, deal more especially with other methods of regulating the right to a hearing. Practically all of the important decisions in this field have involved regulation of the right when asserted in judicial proceedings. The regulation sometimes assumes the form of a restriction on the right to sue. This is valid if the condition imposed has a reasonable relation to a legitimate objective which government may promote. A statute that prohibited suits for damages to crops resulting from the use of fertilizers except after a chemical analysis showing a deficiency in their ingredients made by a public authority does not violate due process but is a reasonable limitation in view of the difficulties of proving damages in such

⁴⁵ See MORGAN v. UNITED L.Ed. 1129, Black's Cas. Constitution. STATES, 304 U.S. 1, 58 S.Ct. 773, 82 al Law, 2d, 708.

cases.⁴⁶ Most of the cases, however, have involved procedural regulations affecting the course of the trial. These are valid if they do not result in denying a person a fair trial. A statute authorizing the commencement of a personal action by the attachment of property of a non-resident defendant having a situs within the state conditioned the right of the defendant to appear and make his defense against the claim on his giving special bail or security in an amount equal to the value of the attached property and costs. A non-resident defendant financially unable to comply therewith was held not to have been denied due process by being denied the right to defend against the claim although this resulted in a judgment subjecting the attached property to the satisfaction of plaintiff's demand.⁴⁷ The Court's reasons were almost wholly historical, although it referred to the reasonable tendency of such provision to bring about an appearance of non-resident defendants for purposes of entering a defense in an action in personam begun as a proceeding quasi in rem. The power of a legislature to prescribe rules of evidence is universally recognized, but it is equally well established that due process limits it in this matter. It may establish rebuttable presumptions only if there is a rational connection between what is proved and what is permitted to be inferred therefrom.⁴⁸ A statute that made the fact that an injury occurred in connection with the operation of a train presumptive evidence of negligence on the part of the railroad has been held valid,⁴⁹ but one that made the mere fact that a collision which resulted in the death of a person occurred at a grade crossing presumptive evidence that the railroad had been negligent in respect of each of the particulars alleged in the complaint and made the railroad liable unless it showed due care in respect of every matter alleged against it is so unreasonable as to deny the railroad due process.⁵⁰ It should be noted that the decisions proceed on the assumption that the effect of the presumption is merely to shift the duty of going forward with the evi-

⁴⁶ *Jones v. Union Guano Co.*, 264 U.S. 171, 44 S.Ct. 280, 68 L.Ed. 623.

⁴⁷ *Ownbey v. Morgan*, 256 U.S. 94, 41 S.Ct. 433, 65 L.Ed. 837, 17 A.L.R. 873.

⁴⁸ *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U.S. 35, 31 S.Ct. 136, 55 L.Ed. 78, 32 L.R.A.,N.S., 226, Ann. Cas.1912A, 463.

⁴⁹ *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U.S. 35, 31 S.Ct. 136, 55 L.Ed. 78, 32 L.R.A.,N.S., 226, Ann. Cas.1912A, 463.

⁵⁰ *Western & A. R. R. v. Henderson*, 279 U.S. 639, 49 S.Ct. 445, 73 L. Ed. 884.

dence. The analogy of these cases has been relied upon in connection with a somewhat different type of case. Statutes sometimes authorize trial courts to strike out part or all of a defendant's answer and to give judgment for the plaintiff for the defendant's refusal to obey an order of court directing discovery or inspection of books or other property in his possession. The enforcement of such statutes in cases where a defendant makes no bona fide effort to comply therewith do not deny him the fair hearing required by due process since the court's action is the result of his own wrongful conduct.⁵¹ It was intimated in the same case last cited that such statute would violate due process if applied to a defendant who had made a bona fide effort to comply with the court's order. There is, however, another limit on the validity of applications of such statutes. If the order for discovery relates solely to the proof of the damages demanded by the plaintiff, it is unreasonable and thus violative of due process to strike those parts of the defendant's answer not pertinent thereto, such as affirmative defenses therein made.⁵² The court treated the statute as in effect creating a presumption of the want of merit in the defenses made in the answer and held that it would be unreasonable to draw any inference that the affirmative defenses were without merit from the refusal to obey an order of discovery relating to the measure of damages only. A statute would be invalid that permitted a court to strike defendant's answer for any refusal to obey an order of the trial court unless justified by the foregoing principles, and such an order of a court would be equally invalid if not based on statute. It has, accordingly, been held that a decree pro confesso entered after striking defendant's answer in punishment for his contempt of a court order is void for want of due process, and need not be given any effect in the courts of another jurisdiction.⁵³ A defendant in quo warranto proceedings is not denied due process by having a fine imposed upon it where the prayer for relief asked merely for ousting it from the exercise of its franchise where this was in accordance with the recognized practice in the state at the time when the pro-

⁵¹ *Hammond Packing Co. v. State of Arkansas*, 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed. 530, 15 Ann.Cas. 645.

⁵² *Feingold v. Walworth Bros.*, 238 N.Y. 446, 144 N.E. 675.

⁵³ *Hovey v. Elliott*. 167 U.S. 409,

17 S.Ct. 841, 42 L.Ed. 215. See also *Hutchinson v. Hutchinson*, 126 Or. 519, 270 P. 484, 62 A.L.R. 660 (holding it a denial of due process to punish a defendant in a divorce action for contempt by depriving him of right to participate in the trial).

ceedings were commenced.⁵⁴ This decision cannot be construed as a general authority for permitting a court to render a judgment against a defendant in excess of the relief prayed for against him. Due process does not require that a person be accorded more than one full and fair hearing. A statute prohibiting the granting of more than two new trials on the facts in the same cause, construed as preventing the trial court from granting a greater number only if there was some evidence to support the verdict on the second re-trial, meets due process requirements.⁵⁵ It would be invalid if so applied as to permit a judgment to be entered on a verdict not supported by any evidence, but that principle would apply regardless of the number of new trials permitted.⁵⁶

Vicarious Hearing

It is the general rule that the right to be heard with respect to a given matter, if required by due process, must be accorded the very person who is to be finally bound by the decision thereon. This ordinarily requires that he himself shall have had the right to appear and be heard thereon in the proceedings in which such decision is made. It, accordingly, violates due process to enforce a judgment against a person which was based on the assumption that the existence of certain prerequisites to his liability had been conclusively determined against him by the judgment in another case against another person between whom and the former there existed no privity with respect to the matter involved in the earlier action.⁵⁷ Due process would not prevent giving the prior judgment such effect if the requisite privity had existed between the judgment debtor and the party held bound by the determinations made in the action in which that judgment was rendered. It permits holding one bound by a decision made in a proceeding in which he can reasonably be said to have been represented by another with respect to the subject-matter of such decision if the latter

⁵⁴ *Standard Oil Co. v. State of Missouri ex inf. Hadley*, 224 U.S. 270, 32 S.Ct. 406, 56 L.Ed. 760, Ann.Cas. 1913D, 936.

⁵⁵ *Louisville & N. R. Co. v. Woodson*, 134 U.S. 614, 10 S.Ct. 628, 33 L. Ed. 1032.

⁵⁶ See *Northern Pac. R. Co. v. De-*

partment of Public Works of State of Washington, 268 U.S. 39, 45 S.Ct. 412, 69 L.Ed. 836; *Chicago, M. & St. P. R. Co. v. Public Utilities Commission*, 274 U.S. 344, 47 S.Ct. 604, 71 L.Ed. 1085.

⁵⁷ *Postal Telegraph Cable Co. v. City of Newport, Ky.*, 247 U.S. 464, 38 S.Ct. 566, 62 L.Ed. 1215.

was accorded the requisite opportunity to be heard. This problem has frequently arisen where statutes for the liquidation of the affairs of insolvent corporations have provided that corporate shareholders should be bound by the decision on certain matters on which their liability to creditors depended though they were not legally within the jurisdiction of the court rendering the decision. It has been held that a statute that made the decision of the court on the amount of the assessment per share binding upon a shareholder who was not personally a party to the proceedings does not deny the shareholder due process, and that he is bound thereby in a subsequent suit to collect the assessment.⁵⁸ This has been supported both on the theory that the shareholders had consented to have the corporation represent them for the purpose of adjudicating this matter, and on the theory that they have voluntarily assumed a relationship subject to regulation and to which the procedure in question has been attached as an incident through an exercise of that power of regulation. These theories are allowed to prevail where the statute under which the corporation was organized permits this procedure, since in that event the shareholders are deemed to have had fair warning of the consequence of their becoming such. They are not permitted to prevail where such statute provides for a procedure negating any inference that the corporation would represent its shareholders so as to permit a decision as to its insolvency and the amount to be assessed against shareholders to be conclusively determined against them in a proceeding against it to which such shareholders were not parties.⁵⁹ Shareholders could not validly be held bound by decisions reached in such proceedings on matters of defense personal to themselves such as that they were not shareholders or had already fully discharged their liability, since their corporation could in no sense be said to represent them with respect to those matters. It should be noted that the statutes, involved in the decisions dealing with the extent to which a corporation may be deemed to represent its shareholders so that a decision on a matter in proceedings against it may bind even such shareholders as were not within the court's jurisdiction, did permit any shareholder to be heard on such matters as were

⁵⁸ *Converse v. Hamilton*, 224 U.S. 243, 32 S.Ct. 415, 56 L.Ed. 749, Ann. Cas.1913D, 1292; *Selig v. Hamilton*, 234 U.S. 652, 34 S.Ct. 926, 58 L.Ed. 1518, Ann.Cas.1917A, 104.

⁵⁹ *Christopher v. Brusselback*, 302 U.S. 500, 58 S.Ct. 350, 82 L.Ed. 388.

referred to in the preceding sentence. The principles applied in determining the extent of corporate representation of shareholders in cases in which the latter, though permitted to be heard, were not heard, would also define its limits where they were not permitted to be heard. A shareholder is not entitled to be heard in a suit by a stranger against the corporation on the issue of its liability to the former even when the judgment therein is a condition precedent to a liability imposed on him, or, at least, if he is entitled to be heard thereon, the hearing accorded the corporation suffices. He is, however, entitled by due process to be heard on any matter affecting the liability imposed on him as a consequence of the judgment against the corporation. This includes a right to a hearing upon such matters as whether the judgment against the corporation is void or voidable for want of jurisdiction or fraud. Hence a statute authorizing the issuance of summary execution against a shareholder, whose shares are not fully paid, upon a return of execution against the corporation "nulla bona", denies him due process where he is permitted to enjoin the execution against him only upon proof of the fact that he is not a shareholder or that the amount of the execution against him exceeds his unpaid subscription.⁶⁰ The theory of notice and hearing by representation was invoked in one case to sustain proceedings subjecting the property of the lessor to execution to satisfy a judgment against his tenant rendered in a suit in which the former was not entitled to be heard. The statute in question subjected the lessor's property to the payment of the judgment obtained against a tenant operating a saloon on the leased premises in favor of the wife for injury to her means of support through the tenant's sale of intoxicants to her husband. The landlord was permitted, in the proceedings to subject his property to the payment of the judgment, to be heard on whether he had knowingly leased the premises for use for saloon purposes, that being the only condition, other than the rendering of a judgment against his tenant, on which the liability of his property depended.⁶¹ The Court supported its decision in part upon the state's broad power to regulate the liquor traffic. It is clear from the case referred to immediately preceding this that the lessor would have been permitted a hearing on the validity, but not the correctness, of the judgment against his tenant. It cannot be definitely af-

⁶⁰ *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 35 S.Ct. 625, 59 L.Ed. 1027. ⁶¹ *Elger v. Garrity*, 246 U.S. 97, 38 S.Ct. 298, 62 L.Ed. 596.

firmed how far due process permits a factitious representation to be treated as an adequate representation in connection with the matters hereinbefore considered.

Miscellaneous Requirements

A person is entitled to have any tribunal, empowered to determine his legal rights or liabilities, do so on the basis of the law applicable to the facts of his case as presented to it in a fair hearing. Due process does not, however, entitle him to have the ultimate decision on the facts made by one tribunal rather than another, nor does it require them to be finally decided by a jury.⁶² A person is, furthermore, not entitled by due process to have a decision against him disregarded solely because of honest errors of law committed in reaching it.⁶³ It has frequently been stated that a fraudulent decision, whether of a court or other tribunal, would deny due process to the person injured thereby.⁶⁴ In determining whether a person has been accorded the fair notice and hearing required by due process, it is necessary to consider the entire remedial process available to him, since a failure at one point therein may be fully remedied at another stage. It is also necessary to consider all his available remedies, not merely a particular one thereof. Thus a statute does not deny due process because it excludes all claims of ultimate right to property from possessory actions where those rights can be fully tried in another form of action,⁶⁵ and a statute permitting summary executive processes without a hearing is valid if it permits a judicial determination of the existence of the liability on demand of the party whose property was seized.⁶⁶ If a person has been accorded a full and fair hearing on any matter, whether of fact or law, before the kind of tribunal that may, consistently with due process, render a final decision thereon, then due process does not require that he have a right to appeal there-

⁶² *Southern R. Co. v. City of Durham*, N.C., 286 U.S. 178, 45 S.Ct. 51, 69 L.Ed. 231; *Wagner Electric Mfg. Co. v. Lynden*, 262 U.S. 226, 43 S.Ct. 589, 67 L.Ed. 961.

⁶³ *Abbott v. National Bank of Commerce*, 175 U.S. 409, 20 S.Ct. 153, 44 L.Ed. 217; *Patterson v. State of Colorado*, 205 U.S. 454, 27 S.Ct. 556, 51 L.Ed. 879, 10 Ann.Cas. 689; *Jones v. Buffalo Creek Coal & Coke*

Co., 245 U.S. 328, 38 S.Ct. 121, 62 L.Ed. 325.

⁶⁴ See *Fallbrook Irr. Dist. v. Bradley*, 164 U.S. 112, 17 S.Ct. 56, 41 L.Ed. 369.

⁶⁵ *Blanchi v. Morales*, 262 U.S. 170, 43 S.Ct. 526, 67 L.Ed. 928.

⁶⁶ *Coffin Bros. & Co. v. Bennett*, 277 U.S. 29, 48 S.Ct. 422, 72 L.Ed. 768.

from.⁶⁷ There is nothing requiring a person to avail himself of the chance to be heard, and due process is not denied him if the failure to obtain a hearing is due to his own fault. A state has been held not to deny due process to the surety held liable on a supersedeas bond who adopted the wrong method for procuring a review of the judgment against him and whose chance for a review thereof by the correct method has lapsed before a final determination of the incorrectness of the method followed by him.⁶⁸ But if the failure to obtain a full hearing is due to no fault on his part but to the action of a state's authorized agents, then a person's right to a full and fair hearing is deemed denied, and an enforcement of the judgment against him would deny him due process.⁶⁹ It should also be noted that it is almost universally held that due process cannot be satisfied by giving notice and an opportunity to be heard as a matter of grace, but the law must accord these as a matter of right.⁷⁰ The cases are somewhat in conflict as to when the governing law satisfies this test.⁷¹

⁶⁷ *State of Ohio ex rel. Bryant v. Akron Metropolitan Park Dist. for Summit County*, 281 U.S. 74, 50 S.Ct. 228, 74 L.Ed. 710, 66 A.L.R. 1460.

⁶⁸ *American Surety Co. v. Baldwin*, 287 U.S. 156, 53 S.Ct. 98, 77 L.Ed. 231, 86 A.L.R. 298.

⁶⁹ *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107.

⁷⁰ *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 35 S.Ct. 625, 59 L.Ed. 1027; *Smith v. State Board of Medical Examiners*, 140 Iowa 66, 117 N.W. 1116; *Northern Cedar Co. v. French*, 131 Wash. 394, 230 P. 837;

Shealy v. Seaboard Air Line R. Co., 131 S.C. 144, 126 S.E. 622; *Chicago, M. & St. P. R. Co. v. Board of Railroad Commissioners*, 76 Mont. 305, 247 P. 162.

⁷¹ Statutes frequently permit summary enforcement of liens by the lienholder. These are generally held not to deny due process to others having rights in such property merely because not requiring notice to be given them. See *Willis v. LaFayette-Phoenix Garage Co., Inc.*, 202 Ky. 554, 260 S.W. 364 (lien for repairs); *Scott v. Paisley*, 271 U.S. 632, 46 S.Ct. 591, 70 L.Ed. 1123 (statutory power of sale given mortgagee).

EXTENT TO WHICH DUE PROCESS REQUIRES JUDICIAL DECISION

335. Due process does not necessarily mean judicial process. It permits the ultimate decision on the facts on the existence of which private rights depend in particular cases to be made by executive or administrative officials after a fair hearing, except in the cases in which constitutional rights depend upon their existence or non-existence. In the case of the former due process requires only that executive or administrative findings of fact be supported by some evidence presented to the official or board in the hearing in which they were made; in the latter class of fact findings, it requires an independent judicial judgment thereon.
336. Due process does require the final judicial determination of matters of constitutional law on which depend the existence of a person's legal rights or liabilities; and of other questions of law except where these relate to privileges which government is free to grant or deny at its sole discretion.
337. The right to a judicial determination of matters involving private rights may be satisfied either by according it in the first instance or by providing for an adequate judicial review of executive or administrative determinations thereof.

Administrative Finality

The rights to notice and an opportunity to be heard, as defined in the preceding Section, exist whether the final decision on any given matter is entrusted to an executive officer or board, an administrative board, or a court. The present Section will consider the extent to which due process limits government in selecting the officials or tribunals empowered to make the final decision on any matter affecting private rights or liabilities insofar as these are involved in the application of law to particular cases. A previous analysis has indicated that this process involves vesting in some person the final decision on questions of constitutional law, on the meaning of legal rules, and on the facts of the case to be decided. It is indisputable that due process would be fully satisfied by vesting the final decision on all those matters in a court. It is, however, equally well established that it does not require ultimate judicial determination of all of them. The principal problem has been that of determining the extent to which the final decision on any or all of them may be entrusted to executive or administrative officers or boards. A person is

entitled by due process to a judicial determination of the constitutionality of the rule of law sought to be applied to him. This is clear from those decisions that require an independent judicial determination of what are called "constitutional facts", such, for example, as the value of the property alleged to be confiscated by rates established by public authority.⁷² Although there has been a vigorous dissent against including an ultimate judicial determination of such facts, this has not been based on a general theory that due process does not require the ultimate decision of constitutional issues by a court but solely that such right does not include that of final judicial determination of such facts.⁷³

The extent to which due process requires an ultimate judicial decision on questions of law, other than those of constitutionality, that may arise in applying a rule of law to a specific case depends upon the character of the rights involved therein. It is, of course, inevitable that the executive or administrative officials charged with the enforcement of a given law shall in the first instance decide both questions of law and fact that arise in the course of the administrative proceedings occurring in the process of its enforcement. It is frequently difficult to effect a complete separation between questions of law and fact in these proceedings, as indicated by the frequent reference in judicial opinions reviewing administrative action to "mixed questions of law and fact." The character of the activities of administrative officials in applying law to specific cases is very similar to that of a court, and they are frequently described as "acting judicially" or "acting in a quasi-judicial manner."⁷⁴ The laws which they are charged with enforcing generally confer upon them a fairly broad discretion not only in ascertaining facts but in construing those laws. There have been numerous decisions that the courts will not review their exercise of the discretion so conferred in either mandamus or injunction proceedings,⁷⁵ and others in which the same refusal to review it has been affirmed in other forms of

⁷² *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 40 S.Ct. 527, 64 L.Ed. 908; *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 56 S.Ct. 720, 80 L.Ed. 1033.

⁷³ See dissenting opinions in the cases cited in footnote 72.

⁷⁴ See *Reetz v. People of State of*

Michigan, 188 U.S. 505, 23 S.Ct. 390, 47 L.Ed. 563; *People v. Hasbrouck*, 11 Utah 291, 39 P. 918.

⁷⁵ *Marquez v. Frisbie*, 101 U.S. 473, 25 L.Ed. 800; *United States ex rel. Riverside Oil Co. v. Hitchcock*, 190 U.S. 316, 23 S.Ct. 698, 47 L.Ed. 1074; *Bates & Guild Co. v. Payne*, 194 U.S. 106, 24 S.Ct. 595, 48 L.Ed. 894.

proceeding in which the legality of their exercise of their discretion was called in question.⁷⁶ While it has been said, in connection with the question of the constitutionality of conferring upon them the power of final decision on questions of law, that no provision of the federal Constitution forbids a state "from granting to a tribunal, whether called a court or board of registration, the final determination of a legal question",⁷⁷ and also that courts have no general supervisory power to control the decision of such officials on matters within their jurisdiction as defined by the legislature,⁷⁸ the actual decisions recognize a judicial right to review the decisions of such officials on questions of law which is, however, exercised only where their decision thereon is clearly wrong.⁷⁹ These decisions may not, therefore, be taken as deciding that due process permits the final decision on a question of law involving private rights or liabilities to be made by executive or administrative officials or boards. They do, however, imply that a procedure under which the power to decide questions of law is vested in the first instance in executive or administrative officials or boards is consistent with due process if their determinations thereon are reviewable by a court possessing authority to set aside the decisions based thereon if such determinations are arbitrary or clearly erroneous. They do not deny the general principle that due process requires that the courts be vested with the power of ultimately passing upon questions of law on which private rights or liabilities depend except where the private person's claim is not of a legal right but of a privilege which government has the constitutional power to grant or withhold at its sole discretion.⁸⁰ The requirements of due process are, however, satisfied if adequate provision is made for an ultimate judicial decision thereon by way of a review of the provisional executive or administrative determination thereof.⁸¹

A person is not generally entitled by due process to an ultimate judicial determination on whether in his case the facts exist

⁷⁶ *Reetz v. People of State of Michigan*, 188 U.S. 505, 23 S.Ct. 390, 47 L.Ed. 563.

⁷⁷ See *Reetz v. People of State of Michigan*, 188 U.S. 505, 23 S.Ct. 390, 47 L.Ed. 563.

⁷⁸ See *Bates & Guild Co. v. Payne*, 194 U.S. 106, 24 S.Ct. 595, 48 L.Ed. 894.

⁷⁹ See *Bates & Guild Co. v. Payne*,

194 U.S. 106, 24 S.Ct. 595, 48 L.Ed. 894.

⁸⁰ See discussion in concurring opinion of Mr. Justice Brandeis in *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 56 S.Ct. 720, 80 L.Ed. 1033.

⁸¹ *Phillips v. Commissioner of Internal Revenue*, 283 U.S. 589, 51 S.Ct. 608, 75 L.Ed. 1289.

on the existence of which his rights or liabilities depend. Their final determination may in most instances be left to an executive or administrative official or board. This principle is applied not only where the controversy involves claims made by a private person against the government in relation to privileges which it is free to grant or deny at its sole discretion, but also where government aims to regulate private activities through executive or administrative machinery. A typical example of the former is afforded by executive or administrative proceedings for the settlement of the conflicting rights of claimants to parts of the public domain under statutes providing for its disposition or use. The executive determination of the privilege of using the mails in particular cases furnishes another example of proceedings belonging in this class. The principle that the executive may be given the final decision on questions of fact arising in such proceedings is so firmly established that its constitutionality is seldom, if ever, questioned.⁸² The most important field in which this general principle of the finality of administrative findings of fact is applied is represented by cases of the second type referred to above. Thus due process is not violated by giving finality to the fact determinations of a board authorized to grant, deny, or revoke licenses to engage in a business or profession which the legislature could not completely prohibit,⁸³ or to the findings of fact on which is based an award made by a workmen's compensation board.⁸⁴ The same finality may validly be given to the findings of fact of regulatory commissions charged with the enforcement of anti-monopoly or other laws or with establishing public utility rates.⁸⁵ An important field in which finality may validly be accorded executive or administrative determinations of fact is that involving the collection of taxes or other sums due the government. Thus due process is not violated by giving finality under tariff laws to the valuations of im-

⁸² See *Burfenning v. Chicago, St. P., M. & O. R. Co.*, 163 U.S. 321, 16 S.Ct. 1018, 41 L.Ed. 175; *Bates & Guild Co. v. Payne*, 194 U.S. 106, 24 S.Ct. 595, 48 L.Ed. 894; *Public Clearing House v. Coyne*, 194 U.S. 497, 24 S.Ct. 789, 48 L.Ed. 1092.

⁸³ See *Reetz v. People of State of Michigan*, 188 U.S. 505, 23 S.Ct. 390, 47 L.Ed. 563 (permitting such finality

to be given to administrative decisions even on matters of law).

⁸⁴ *Nega v. Chicago Rys. Co.*, 317 Ill. 482, 148 N.E. 250, 39 A.L.R. 1057.

⁸⁵ *Arkansas Wholesale Grocers' Assn. v. Federal Trade Commission*, 8 Cir., 18 F.2d 866; *Interstate Commerce Commission v. Union Pac. R. Co.*, 222 U.S. 541, 32 S.Ct. 108, 56 L. Ed. 308.

ports made by an executive board,⁸⁶ and to assessments of the value of property for tax purposes.⁸⁷ It should be noted, however, that finality in this connection does not mean that the party affected by the findings is wholly deprived of a right to a judicial scrutiny thereof. Due process entitles him to a judicial review of such findings, but that judicial review is limited in scope. The courts will not review them by passing upon the credibility of the witnesses at the hearing or upon the weight of the evidence, but only for the purpose of ascertaining whether there is any evidence to support the findings.⁸⁸ This is the extent of the constitutional standard to which the action of non-judicial bodies must conform in making their findings of the facts for their determination of private rights or liabilities, and probably, also of private claims of the character of privileges tendered by government. Due process requires judicial review of their findings of fact only so far as necessary to insure compliance with that standard.⁸⁹ The ultimate basis for this requirement is that due process demands a decision in accordance with the evidence presented to the administrative official or board in the proceedings themselves.

There is, however, an important exception to the principle that due process permits finality to be accorded the findings of fact of administrative officials or boards. It prohibits such finality where constitutional rights of liberty or property are involved in the administrative proceedings and depend upon the existence or non-existence of such facts. The denial of finality to administrative determinations of such facts means that due process requires that there be judicial review thereof, and that the court authorized to review administrative decisions based thereon be permitted not merely to determine whether there is any evidence in the record of proceedings to support the findings but to exercise its own independent judgment as to the findings that should have been made. This implies a power and duty on its

⁸⁶ *Hilton v. Merritt*, 110 U.S. 97, 3 S.Ct. 548, 28 L.Ed. 83; *Passavant v. United States*, 148 U.S. 214, 13 S.Ct. 572, 37 L.Ed. 426.

⁸⁷ *Kentucky Railroad Tax Cases*, 115 U.S. 321, 6 S.Ct. 57, 29 L.Ed. 414.

⁸⁸ *Interstate Commerce Commission v. Union Pac. R. Co.*, 222 U.S. 541, 32

S.Ct. 108, 56 L.Ed. 308; *Northern Pac. R. Co. v. Department of Public Works, of State of Washington*, 268 U.S. 39, 45 S.Ct. 412, 69 L.Ed. 837.

⁸⁹ *Helfrick v. Dahlstrom Metallic Door Co.*, 256 N.Y. 199, 176 N.E. 141. See also *Booth Fisheries Co. v. Industrial Commission of Wisconsin*, 271 U.S. 208, 46 S.Ct. 491, 70 L.Ed. 908.

part to pass on the weight of the evidence.⁹⁰ It has recently been stated that this does not require it to disregard the weight to be attached to the administrative findings if made upon hearing and evidence. This factor is to be considered since the judicial duty must be exercised in the light of the whole legislative process, including the administrative proceedings already had in the case. It has, accordingly, been stated that such findings, particularly if made by an expert legislative agency such as a public service commission regulating public utility rates, will not be disturbed unless they are plainly shown to be wrong.⁹¹ This doctrine has had its principal application in the judicial review of public utility rates established by a commission after investigation and hearing. It has been supported largely upon the theory that, if the legislature itself had acted, its declarations or findings would have been subject to an independent judicial review on both law and facts to prevent a violation of the constitution, and that it cannot escape constitutional limitations by authorizing its agent to make conclusive findings that it has remained within those limitations.⁹² The emphasis in the opinion of the Supreme Court, on which the preceding remarks are based, was upon the legislative character of the administrative board's action. This has led some courts to hold that due process does not require this extent of judicial review of the findings of fact of an administrative board on which are based its so-called quasi-judicial actions such as an award of compensation under a workmen's compensation act.⁹³ It cannot, however, be definitively affirmed that the principle in question has been decided to be inapplicable to the review of the facts in such cases. It has its ultimate basis in a theory that this extent of judicial review is necessary for the adequate protection of constitutionally guaranteed private rights. The quasi-judicial action of an administrative agency may invade these as well as its so-called legislative actions, and the invasion may be as inextricably involved in and be

⁹⁰ See *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 40 S.Ct. 527, 64 L.Ed. 908; *ST. JOSEPH STOCK YARDS CO. v. UNITED STATES*, 298 U.S. 38, 56 S.Ct. 720, 80 L.Ed. 1033, *Black's Cas. Constitutional Law*, 2d, 713.

⁹¹ *ST. JOSEPH STOCK YARDS CO. v. UNITED STATES*, 298 U.S. 38, 56 S.Ct. 720, 80 L.Ed. 1033,

Black's Cas. Constitutional Law, 2d, 713.

⁹² That it does not deny due process to try the issues of fact involved in rate litigation by a jury, see *Union Gas Public Service Co. v. Texas*, 303 U.S. 123, 58 S.Ct. 483, 82 L.Ed. 702.

⁹³ *Nega v. Chicago Rys. Co.*, 317 Ill. 482, 148 N.E. 250.

caused by its findings of fact in the former as in the latter case. Thus the question of whether a resident of the United States is a citizen thereof is deemed a question of fact unless an erroneous definition of citizenship should be applied in a given case. A statute authorizing the executive deportation of resident aliens would not justify the deportation of a resident citizen. A claim of citizenship by a resident threatened with executive deportation is a denial of an essential jurisdictional fact on which he is entitled to a judicial decision, at least where he has supported it before the executive with evidence which, if believed, would entitle him to a finding of citizenship.⁹⁴ The proposed action of the executive would clearly be termed quasi-judicial rather than legislative in character. It is thus clear that the findings of an executive or administrative official or board on an essential jurisdictional fact may be subjected to an independent judicial review where such finding is an essential element on which is based an action that would deprive a person of a constitutional right. There is no sound reason for limiting such review of the quasi-judicial actions of administrative boards to cases in which the infringement of constitutional rights is based upon erroneous, though not wholly unsupported, findings of fact affecting their jurisdiction to act. On the other hand, there is no reason for applying the type of judicial review herein considered to every jurisdictional fact specified in the statute under which an administrative board acts. Such boards are seldom given power of final determination of the existence of the facts on which their jurisdiction to act is conditioned, but it cannot be said to have been finally decided that due process would be violated by merely giving them that power. It would probably be held to do so in those cases, but only in those cases, in which the result of erroneous findings thereon would result in an order violating a person's constitutional rights. However, the decisions do not warrant any degree of dogmatism in this matter.⁹⁵ The position has recently been strongly urged that ultimate judicial de-

⁹⁴ *Ng Fung Ho v. White*, 259 U.S. 276, 42 S.Ct. 492, 66 L.Ed. 938.

⁹⁵ See in this connection *Louisville & N. R. Co. v. Garrett*, 231 U.S. 298, 34 S.Ct. 48, 53 L.Ed. 229; *State ex rel. Dushek v. Watland*, 51 N.D. 710, 201 N.W. 680, 39 A.L.R. 1169; *Market St. R. Co. v. Pacific Gas & Electric Co.*, D.C., 6 F.2d 633. For a discussion of the extent to which this

may be required as a necessary part of the judicial power conferred upon constitutional courts by the federal Constitution, see *Crowell v. Benson*, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598. The lower federal court based its decision in this case upon the due process clause of the Fifth Amendment; *Benson v. Crowell*, D. C., 33 F.2d 137.

termination of facts is required by due process where administrative actions affect constitutional rights of liberty but not necessarily where they affect merely constitutional rights of property. This has been urged especially in cases involving the judicial review of rates as essential for their effective regulation and to relieve the courts of the undue burden that rate litigation involving the issue of confiscation has imposed upon them.⁹⁶

Regulating Judicial Review

The requirements of due process relative to the ultimate judicial determination of matters of law and fact affecting private rights may be satisfied either by providing for their judicial decision in the first instance or by providing for an adequate judicial review of executive or administrative decisions thereon. Due process also prohibits so burdening the exercise of the rights thus conferred as to practically force those entitled thereto to forego them as the lesser of two evils. A common method of doing this is to impose penalties for violations of legislation or of administrative orders that are so severe that they "might well deter even the boldest and most confident" from appealing to the courts for the protection of their rights.⁹⁷ This does not prevent government from imposing heavy penalties in such cases under all circumstances, but means only that it may not do so unless adequate opportunity is afforded for procuring the judicial determinations with respect to a given matter to which due process entitles a party.⁹⁸ This principle has been invoked most frequently in connection with attempts of the states to prevent the judicial review of the issue whether rates established under their authority were confiscatory.⁹⁹ A procedural arrangement under which this issue could be judicially tried only in contempt proceedings for violating a rate order, each separate violation of which entailed liability for a heavy penalty, has been held to deny due process.¹ It has also been in connection with state regulation

⁹⁶ See concurring opinion of Mr. Justice Brandeis in *ST. JOSEPH STOCK YARDS CO. v. UNITED STATES*, 298 U.S. 38, 56 S.Ct. 720, 80 L.Ed. 1033, *Black's Cas. Constitutional Law*, 2d, 713.

⁹⁷ *Oklahoma Operating Co. v. Love*, 252 U.S. 331, 40 S.Ct. 338, 64 L.Ed. 596.

⁹⁸ *St. Louis, I. M. & S. R. Co. v.*

Williams, 251 U.S. 63, 40 S.Ct. 71, 64 L.Ed. 139.

⁹⁹ *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714, 13 L.R.A., N.S., 932, 14 Ann.Cas. 764. *Wadley Southern Ry. Co. v. State of Georgia*, 235 U.S. 651, 35 S.Ct. 214, 59 L.Ed. 405.

¹ *Oklahoma Operating Co. v. Love*, 252 U.S. 331, 40 S.Ct. 338, 64 L.Ed.

of public utility rates and practices that statutes have been enacted which, while providing for the judicial review of administrative orders, prohibited the introduction in the judicial proceedings of evidence other than that submitted in the proceedings before the board that eventuated in the order under review. This was held not to deny due process where the utility company was definitely informed in the administrative proceedings of the order asked for and finally entered against it, and was given ample opportunity to be heard, including the benefit of compulsory process for obtaining witnesses.² It is clear from the opinion in the case last cited that due process would be violated by such statute if the defendant in the administrative proceedings were denied a full and fair hearing before the board on every matter of fact on which the validity of the order entered against it depended, and might be deemed violated if it operated to exclude newly discovered relevant evidence. The order involved in that case required defendant to make a track connection with other railroads. How far the same principles would apply to rate orders or other orders cannot be definitely stated. In a case involving an order of the Interstate Commerce Commission prescribing a division of a through rate among the participating carriers the order was assailed by some of them as confiscatory. The court reviewing said order permitted the carrier to introduce evidence in addition to that which had been presented before the Commission. The Supreme Court denied the government's contention that this was error by an argument that is ultimately based on the theory that the protesting carrier was entitled by due process to do so, since due process assures a full hearing before the court or other tribunal empowered to perform the judicial function involved, which, in this case, was the decision of the constitutionality of the order.³ This theory may require some limitation of the principle on which the earlier decision was based to cases in which the issue is not one involving the defendant's constitutional property or personal rights. The earlier case, however, also involved an issue of the defendant's constitutional property rights.

956. See also *State ex rel. Dushek v. Watland*, 51 N.D. 710, 201 N.W. 680, 39 A.L.R. 1169.

² *State of Washington ex rel. Oregon R. & Nav. Co. v. Fairchild*, 224 U.S. 510, 32 S.Ct. 535, 56 L.Ed. 863.

See also *Illinois Cent. R. Co. v. Paducah Brewing Co.*, 157 Ky. 357, 163 S.W. 239.

³ *Baltimore & O. R. Co. v. United States*, 298 U.S. 349, 56 S.Ct. 797, 80 L.Ed. 1209.

Summary Executive or Administrative Proceedings

The adequate protection of the public interest at times justifies resort to summary executive or administrative action in the first instance with provision for more formal inquiry thereafter. This is but a special case of the principles permitting executive decisions on private rights with the additional element of a summary execution of such decisions. It has already been established that executive process may under certain circumstances and within certain limits constitute due process. Such process may be, and in some cases must be, preceded by notice and an opportunity to be heard before the decision reached therein can be validly executed. This is required in immigration and deportation cases. In such cases the problem is generally that of the extent to which due process permits giving the final decision on questions of fact to executive or administrative officials. This may be validly done with respect to every such question, including that of citizenship, in the case of persons seeking admission to the country,⁴ and with respect to all such questions except that of citizenship in proceedings for the deportation of resident aliens within the United States.⁵ Due process does, however, require a fair hearing in both classes of cases. The scope of judicial review required in such cases is, except as to citizenship in deporting resident aliens, limited to insuring that fair trial.⁶ Resort to summary executive proceedings for the collection of taxes due the United States or the states does not violate due process if adequate opportunity is afforded for a subsequent judicial determination of the taxpayer's legal rights.⁷ It would probably also be valid if subsequent administrative review were allowed as to matters on which administrative boards may be given finality with an adequate judicial review of matters with respect to which due process requires this.⁸ Summary

⁴ UNITED STATES v. JU TOY, 198 U.S. 253, 25 S.Ct. 644, 49 L.Ed. 1040, Black's Cas. Constitutional Law, 2d, 701; Quon Quon Poy v. Johnson, 273 U.S. 352, 47 S.Ct. 346, 71 L.Ed. 680.

⁵ Ng Fung Ho v. White, 259 U.S. 276, 42 S.Ct. 492, 66 L.Ed. 938.

⁶ Kwock Jan Fat v. White, 253 U.S. 454, 40 S.Ct. 566, 64 L.Ed. 1010; United States ex rel. Tisi v. Tod,

264 U.S. 131, 44 S.Ct. 260, 68 L.Ed. 590.

⁷ Springer v. United States, 102 U.S. 586, 26 L.Ed. 253; Scottish Union & National Ins. Co. v. Bowland, 196 U.S. 611, 25 S.Ct. 345, 49 L.Ed. 619; Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 51 S.Ct. 608, 75 L.Ed. 1289.

⁸ Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 51 S.Ct. 608, 75 L.Ed. 1289.

proceedings in this field are usually carried out after the taxpayers have had some notice and opportunity to be heard, but this is not required by due process if the total procedure accords the safeguards just considered. Summary collection of sums due the United States from collectors of internal revenue is also valid under the same conditions.⁹ The summary infliction of penalties in connection with the enforcement of immigration and tariff laws has always been held consistent with due process, even without preliminary notice and opportunity to be heard, but adequate provision for subsequent judicial review of matters with respect to which due process requires it must be made.¹⁰ But due process is violated by the summary assessment and collection, without an opportunity for a hearing of any kind, of a criminal penalty, and this prohibition cannot be avoided by calling it a tax.¹¹ The mere opportunity for a subsequent judicial review would not save such procedure in those cases. There are cases holding that in times of great public danger, as in the case of riots or of the declaration of martial law, due process permits the substitution of executive for judicial process for the temporary deprivation of a person's liberty.¹² But the allowable limits of military discretion, and whether they have been overstepped in a particular case, are judicial questions, and due process undoubtedly requires that those deprived of their liberty or property shall in such cases be accorded reasonable access to the courts for their determination of those matters.¹³

There is another class of cases in which executive officials, either with or without prior notice and hearing being given those affected by their action, summarily seize property and hold it for specified purposes, or seize it and destroy it. Due process is not violated by the summary seizure and destruction, without notice or hearing, of articles used in violation of law, of those that the law may validly declare forfeited, of things that may validly be declared nuisances, or of goods that are dangerous to the public health or safety. It is on this basis that the summary seizure and destruction by executive officials of nets used

⁹ *Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 18 How. 272, 15 L.Ed. 372.

¹⁰ *Oceanic Steam Nav. Co. v. Stranahan*, 214 U.S. 320, 29 S.Ct. 671, 53 L.Ed. 1013; *Lloyd Sabaudo Societa Anonima Per Azioni v. Elting*, 287 U.S. 329, 53 S.Ct. 167, 77 L.Ed. 341.

¹¹ *Lipke v. Lederer*, 259 U.S. 557, 42 S.Ct. 549, 66 L.Ed. 1061.

¹² *Moyer v. Peabody*, 212 U.S. 78, 29 S.Ct. 235, 53 L.Ed. 410.

¹³ See *Sterling v. Constantin*, 287 U.S. 378, 53 S.Ct. 190, 77 L.Ed. 375.

in violation of game laws,¹⁴ impure and unwholesome foods,¹⁵ and intoxicants held in violation of law,¹⁶ have been sustained. The legal right of the officials to seize and destroy a particular article under such statutes depends upon proof that it belongs to the class permitted to be so seized and destroyed. Resort to summary seizure and destruction generally means that its owner has been accorded no hearing on that issue, and would in every case have had no judicial determination of the legality of the executive action. It would violate due process if he were at no time permitted a hearing on these matters and a judicial decision on the questions of law involved. Statutes that provide for such executive proceedings are, therefore, required by due process not only to permit a subsequent judicial determination of the legality of the seizure and destruction but also to provide that the owner receive compensation, either from the public or the officials, for the loss if the seizure and destruction of his property were illegal.¹⁷ Proceedings of this character are exceedingly harsh and due process does not in all instances permit resort to them even when adequate provision is made for judicial review and relief against their illegal use. That is, however, a matter of the non-procedural aspects of due process. Summary seizures are sometimes made for the purpose of conserving assets as an incident to the public administration of the affairs of financial institutions, even without notice or hearing. These statutes are generally held not to violate due process if adequate provision is made for a judicial review of the legality of the seizure within a reasonable time after it is made.¹⁸ This

¹⁴ *LAWTON v. STEELE*, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385, Black's Cas. Constitutional Law, 2d, 704.

¹⁵ *North American Cold Storage Co. v. City of Chicago*, 211 U.S. 306, 29 S.Ct. 101, 53 L.Ed. 195, 15 Ann.Cas. 276; *Miller v. Horton*, 152 Mass. 540, 26 N.E. 100, 10 L.R.A. 116, 23 Am.St. Rep. 850.

¹⁶ *Samuels v. McCurdy*, 267 U.S. 188, 45 S.Ct. 264, 69 L.Ed. 568, 37 A.L.R. 1378.

¹⁷ See *North American Cold Storage Co. v. City of Chicago*, 211 U.S. 306, 29 S.Ct. 101, 53 L.Ed. 195, 15 Ann.Cas. 276.

¹⁸ *State Savings & Commercial Bank v. Anderson*, 165 Cal. 437, 132 P. 755, L.R.A.1915E, 675, affirmed 238 U.S. 611, 35 S.Ct. 792, 59 L.Ed. 1488; *North American Building-Loan Ass'n v. Richardson*, 6 Cal.2d 90, 56 P.2d 1221; *Title Guaranty & Surety Co. of Scranton, Pa., v. Allen*, 240 U.S. 136, 36 S.Ct. 345, 60 L.Ed. 566. But due process is violated where no opportunity is afforded for a judicial determination of the legality of the administrative action; *National Automobile Service Corporation of Pennsylvania v. Barford*, 289 Pa. 307, 137 A. 601.

line of decisions shows that the fundamentals of due process, both with regard to notice and hearing and judicial review, have been maintained for these kinds of summary proceedings in a modified form under which important public interests have been permitted to impose some hardships upon innocent persons.

DUE PROCESS AND THE JURISDICTION OF COURTS

338. The judgment of a court does not bind the person against whom it is rendered unless the court rendering it had jurisdiction of the subject-matter of the action, and of the person of the defendant. The latter requires some form of service of process upon him in order that he may receive the notice and opportunity to be heard to which due process entitles him. The kind of service that will satisfy due process depends upon the character of the judgment asked for and rendered in such proceedings.

General Considerations

The preceding Sections have considered the extent to which due process requires the judicial determination of matters affecting private rights. It is in fact provided for in many cases in which it is not required by due process, either as a matter of grace or by virtue of other constitutional provisions such as those preserving the right of trial by jury in given classes of cases. Judicial proceedings must in any event conform to the procedural requirements of due process. A court is no more permitted to make a decision or render a judgment against a person without according him notice and an adequate opportunity to be heard than is an executive or administrative board permitted to conclusively determine private rights without complying with those conditions. Thus a person charged with contempt of court, except when committed in open court, is entitled by due process to be advised of the charges against him and to be accorded a reasonable opportunity to meet them, including the right to be heard by counsel of his own selection and to call witnesses to give relevant testimony.¹⁹ He is also entitled to have the judgment of the court on the issues involved based upon the evidence presented at the hearing.²⁰ The exception in the case of contempts committed in open court is sometimes justified by the theory that in such case there exists a presumption that

¹⁹ *Cooke v. United States*, 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 767.

²⁰ *People v. McKinlay*, 367 Ill. 504, 11 N.E.2d 933.

the court is fully cognizant of all that happens there, but is in fact based upon the necessity for an immediate vindication of the court's dignity in order to preserve order in the court and protect the administration of law therein.²¹ Other examples of what due process requires in order that litigants may secure the full and fair trial to which due process entitles them have already been given in previous Sections of this Chapter. This Section will discuss only the problem of the jurisdictional requirements for the validity of judicial determinations of private rights.

The first requirement imposed by due process upon a court which assumes to determine the rights of parties is that it have jurisdiction of the subject matter of the controversy.²² A second requirement is that it have jurisdiction of the persons whose rights are to be affected by any judgment or decree that may be rendered in the proceedings.²³ The latter is merely a special instance of the more general principle that due process requires giving notice and an opportunity to be heard to those whose rights are being finally determined in an official proceeding, whatever its character. The methods of obtaining jurisdiction that will satisfy due process depend upon the character of the judgment that may be rendered against the defendants in the action. There are judgments or decrees that impose upon the defendant a personal liability enforceable against his property generally by subsequent executory process or, in some instances, against his person by some type of contempt proceeding. There are others which involve subjecting particular property belonging to the defendant to the discharge of those of his personal obligations that formed the real subject matter of the suit although the property was, prior to the commencement of the suit, in no sense subject to a specific lien for their payment. The other principal type is that which either determines his rights in specific property or affects his personal status in some determinate manner. A suit that leads to a judgment of the kind first mentioned is generally called an action in personam; one that may result in a judgment of the third kind is called an action in rem; and one in which the judgment belongs to the second class is called an action quasi-in-rem. The jurisdictional

²¹ See *Cooke v. United States*, 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 767. L.Ed. 565; *Scott v. McNeal*, 154 U.S. 34, 14 S.Ct. 1108, 38 L.Ed. 896.

²² *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565. ²³ *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565.

requisites for these various types of judicial proceedings are sufficiently different to require a separate consideration for each class.

Actions in Personam

The purpose of an action in personam is to obtain a judgment imposing upon the defendant a personal obligation to pay the plaintiff a sum of money, or to do some act for his benefit such as executing a deed under a decree for the specific performance of a contract for the sale of land. The majority of the decisions have involved actions in which a judgment of the former type was rendered. A court can validly obtain jurisdiction of the defendant in personal actions in any case by actually serving him personally within the state with process advising him of the proceeding against him and tendering him his day in court. This constitutes due process whether the defendant be a resident or non-resident. There have been many state decisions sustaining substituted service upon residents either by leaving the process at his home or last known address within the state or by publication,²⁴ but the federal Supreme Court has never definitely determined the validity of either form of substituted service upon resident defendants in a personal action. It has, however, held invalid service by publication in such an action in the case of a defendant who, though technically domiciled within the state, had left it with the intention of establishing his home outside it.²⁵ The defendant's family was still living within the state. The Court intimated that, in view of defendant's technical position of being still domiciled within the state and of the actual presence of his family therein, leaving a summons at his last and usual place of abode would, perhaps, have been valid. It also affirmed that to dispense with personal service the substitute should at least be that which is most likely to reach the defendant, and held on that basis that service by publication was invalid. If these intimations be accepted as stating the law, it is quite clear that the right to resort to substituted service in the case of resident defendants will be much limited, and that only those forms that meet the suggested test will be held valid. The test does not entirely exclude resort to

²⁴ *Roberts v. Jacob*, 154 Cal. 307, 97 P. 671; *State v. Guilbert*, 56 Ohio St. 575, 47 N.E. 551, 38 L.R.A. 519, 69 Am.St.Rep. 756.

²⁵ *McDonald v. Mabee*, 243 U.S. 90, 37 S.Ct. 343, 61 L.Ed. 608, L.R.A. 1917F, 458.

service by publication, but the statute permitting it will have to carefully guard its use if it is to be sustained.

It was formerly the universal holding that a court could not acquire jurisdiction of a non-resident defendant in a personal action except by personal service of process upon him within the state or by his voluntary and general appearance in the case.²⁶ This is still the rule for all but certain exceptional cases. The cases in which the general rule was first set aside involved statutes authorizing service of process in the case of non-resident defendants upon persons who were by those statutes made their agents for the acceptance thereof. It has never been doubted that service upon an agent authorized by the defendant to accept it would be valid, whether the defendant were a resident or non-resident. The agency established by the statutes last referred to was one forced upon the defendants by law. A voluntary act on their part was a condition precedent to the existence of the statutory agency, but the character of the act would scarcely warrant an inference that the defendants actually intended to appoint an agent to accept service of process by their doing of such an act. It is, of course, possible to take the position that the doing of such act with knowledge that a statute annexed thereto the indicated consequence would convert a fictitious consent into a real consent, but the realities of the situation give an air of speciousness to that type of reasoning. The first instance in which such a statute was sustained involved one which provided in effect that the operation of a motor vehicle over the state's highways should be deemed equivalent to the appointment by the non-resident operator of a designated state official as his agent for accepting service of process in any action growing out of an accident occurring as a result of his operation of such vehicle upon said highways, and to an agreement that such service should be as valid as personal service of process upon the defendant. The statute was sustained on the theory that the operation of such vehicles was a privilege which the state might completely deny non-residents, that it might require an actual appointment of an agent to accept service of process as a condition to its grant of such privilege, and that to provide for an implied appointment of such agent in the manner provided for by the statute amounted to the same

²⁶ *Grover & Baker Sewing Mach. Co. v. Radcliffe*, 137 U.S. 287, 11 S.Ct. 92, 34 L.Ed. 670; *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565.

thing and was, therefore, equally valid.²⁷ The same general approach was adopted to sustain a statute under which a personal action could be commenced against a non-resident engaged in selling securities within the state on a cause of action arising out of the business transacted within it by service of process upon any agent engaged in the conduct of such business.²⁸ Such statutes would clearly be invalid so far as they permitted personal actions to be thus commenced on causes of action not connected with the conduct on which the agent's appointment was based. Such statutes are also invalid if they fail to make adequate provision for notifying the defendant that he is being sued. Such provision need not absolutely insure that he will be notified, but must be such as to make it reasonably probable that he will receive notice thereof.²⁹ In the case of statutes authorizing the commencement of personal actions against non-residents doing business within a state, this is largely a matter of defining which of the non-resident's representatives within the state are to be deemed his agents for accepting service of process. It is quite probable that the principles of these cases will be further extended, particularly if the theory should be accepted that the real basis for their validity is that they are reasonable regulations of the conduct of non-residents within a state rather than conditions that may be validly imposed upon the exercise of privileges which a state is free to grant or withhold. The latter theory has recently been relied upon to sustain a statute authorizing the commencement of proceedings for an injunction against fraudulent sales of securities against non-residents by service of process outside the state.³⁰

A state has the power to exclude foreign corporations from transacting local business within it, and may, therefore, impose any but unconstitutional conditions in giving its consent thereto. It generally requires them to either appoint a local agent to ac-

²⁷ *Hess v. Pawloski*, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091.

²⁸ *HENRY L. DOHERTY & CO. v. GOODMAN*, 294 U.S. 623, 55 S.Ct. 553, 79 L.Ed. 1097, *Black's Cas. Constitutional Law*, 2d, 719; *Stoner v. Higginson*, 316 Pa. 481, 175 A. 527; cf. *Flexner v. Farson*, 248 U.S. 289, 39 S.Ct. 97, 63 L.Ed. 250. For a discussion of service upon an unincorporated association such as a labor union, see *Operative Plasterers'*

and Cement Finishers International Ass'n of United States and Canada v. Case, D.C., 93 F.2d 56.

²⁹ *Wuchter v. Pizzutti*, 276 U.S. 13, 48 S.Ct. 259, 72 L.Ed. 446, 57 A.L.R. 1230; *Grote v. Rogers*, 158 Md. 685, 149 A. 547; *State ex rel. Cronkhite v. Belden*, 193 Wis. 145, 211 N.W. 916, 214 N.W. 460, 57 A.L.R. 1218.

³⁰ *Stevens v. Television, Inc.*, 111 N.J.Eq. 306, 162 A. 248.

cept service of process in suits against them, or to appoint a designated state official as such agent. It is also generally provided that in the absence of such appointment, service of process may be made upon some designated state officer. The latter provision is also applicable where the foreign corporation has failed to qualify to do a local business within the state. There have been numerous cases involving the validity of service made under such statutes in the case of personal actions against such corporations. A foreign corporation may be sued to enforce a personal liability against it if it is doing business within the state in such manner and to such extent as to warrant an inference that it is present therein.³¹ Due process prohibits a suit against it in a foreign state if it is not so present therein.³² Its presence is thus an essential jurisdictional prerequisite. The question whether a given foreign corporation is so present in a particular state depends upon the facts of each case. It may be present there although it has never qualified to do a local business therein, merely by virtue of the fact that it is transacting such business within the state.³³ The mere solicitation of business may not be treated as such,³⁴ but such solicitation accompanied by other activities has been held a sufficient basis for an inference that a foreign corporation was present within a state.³⁵ A foreign corporation whose entire activities within a state consist of interstate or foreign commerce is sufficiently present within such state to be held to be present therein for purposes of service in personal actions arising out of such business, and a statute per-

³¹ Connecticut Mut. Life Ins. Co. v. Spratley, 172 U.S. 602, 19 S.Ct. 308, 43 L.Ed. 569; Louisville & N. R. Co. v. Chatters, 279 U.S. 320, 49 S.Ct. 329, 73 L.Ed. 711.

³² Simon v. Southern Ry. Co., 236 U.S. 115, 35 S.Ct. 255, 59 L.Ed. 492; Old Wayne Mut. Life Ins. Ass'n of Indianapolis, Ind., v. McDonough, 204 U.S. 8, 27 S.Ct. 236, 51 L.Ed. 345; Riverside & Dan River Cotton Mills v. Menafee, 237 U.S. 189, 35 S.Ct. 579, 59 L.Ed. 910.

³³ For cases discussing when a foreign corporation can be deemed present within a state, see, in addition to the cases cited in footnote 32, Com-

mercial Mut. Acc. Co. v. Davis, 213 U.S. 245, 29 S.Ct. 445, 53 L.Ed. 782; Minnesota Commercial Men's Ass'n v. Benn, 261 U.S. 140, 43 S.Ct. 293, 67 L.Ed. 573; People's Tobacco Co. v. American Tobacco Co., 246 U.S. 79, 38 S.Ct. 233, 62 L.Ed. 587, Ann. Cas.1918C, 537.

³⁴ People's Tobacco Co. v. American Tobacco Co., 246 U.S. 79, 38 S.Ct. 233, 62 L.Ed. 587, Ann.Cas.1918C, 537; Thurman v. Chicago, M. & St. P. R. Co., 254 Mass. 569, 151 N.E. 63, 46 A.L.R. 563.

³⁵ Dahl v. Collette, Minn., 279 N.W. 561.

mitting suits against it thereon does not violate the commerce clause.³⁶

The other due process questions to which such statutes have given rise have concerned the methods of service upon foreign corporations. If the corporation actually appoints an agent within the state to accept service of process in personal actions brought against it within the state, service on such agent is valid not only with respect to actions arising out of its business therein but also in the case of actions arising out of its business outside the state.³⁷ An appointment of a designated state official by corporate action as required by the statute under which it was admitted to the state is sometimes held equivalent to the appointment of an actual agent. A foreign corporation is not denied due process by construing such appointment as consent to be sued within the state on causes of action whether arising out of business conducted within or without the state.³⁸ In the absence of such consent, however, service upon an agent so appointed is consistent with due process only with respect to causes of action arising out of, or in connection with, the business conducted within the state.³⁹ But a cause of action may arise out of such business even though it arise in another state, as where a railroad is sued by a passenger purchasing his ticket within the state for an injury occurring outside of it while travelling on such ticket.⁴⁰ Service upon a designated state official, who is not appointed as agent by a foreign corporation and thus derives his whole authority from the statute, is valid in the case of personal actions only where the cause of action arose out of, or in connection with, the corporation's business within the state.⁴¹ It cannot be definitely stated whether due process imposes the same limits where a statute, instead of authorizing

³⁶ *International Harvester Co. v. Commonwealth of Kentucky*, 234 U. S. 579, 34 S.Ct. 944, 58 L.Ed. 1479.

³⁷ *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Min. & Mill Co.*, 243 U.S. 93, 37 S.Ct. 344, 61 L.Ed. 610.

³⁸ *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Min. & Mill Co.*, 243 U.S. 93, 37 S.Ct. 344, 61 L.Ed. 610.

³⁹ *Old Wayne Mut. Life Ins. Ass'n*

of Indianapolis, Ind., v. McDonough, 204 U.S. 8, 27 S.Ct. 236, 51 L.Ed. 345; *Louisville & N. R. Co. v. Chatters*, 279 U.S. 320, 49 S.Ct. 329, 73 L.Ed. 711.

⁴⁰ *Louisville & N. R. Co. v. Chatters*, 279 U.S. 320, 49 S.Ct. 329, 73 L.Ed. 711.

⁴¹ *Old Wayne Mut. Life Ins. Ass'n of Indianapolis, Ind., v. McDonough*, 204 U.S. 8, 27 S.Ct. 236, 51 L.Ed. 345; *Simon v. Southern R. Co.*, 236 U.S. 115, 35 S.Ct. 255, 59 L.Ed. 492.

service upon a designated state officer, permits service upon one who is an agent or representative of the company in connection with the business conducted within the state. Such statutes are valid as applied to causes of action arising out of the business conducted within the state if the agent bears such relation to the corporation as to make it highly probable that he would notify his principal of the service of process.⁴² It has also been held that they are valid if construed to permit the commencement of personal actions against a foreign corporation present within the state on a transitory cause of action arising outside the state and in no manner connected with its business therein.⁴³ This position is questionable. A logical implication of the theory of agency on which the law in this general field has been developed would limit the agent's authority to the period of his agency. This is the rule where the appointment of the agent to accept service of process is based on actual consent as distinguished from a consent inferred from compliance with a statute requiring the agent's appointment for such purpose.⁴⁴ It appears, however, that the removal of a statutory agent as an incident to a foreign corporation's removal from the state, does not prevent subsequent personal actions to be commenced against such corporation on causes of action arising out of its business within the state, and that due process is not violated by authorizing such suits to be commenced by service of process upon a designated state officer even though he was not required to notify such corporation thereof.⁴⁵ But such procedure has been held invalid where the corporation had never appointed a statutory agent whose authority could have been terminated by its withdrawal from the state.⁴⁶ How far these principles would apply to statutes making those representing a foreign corporation in its business transacted within a state agents to accept service of process in personal actions against

⁴² *Commercial Mut. Acc. Co. v. Davis*, 213 U.S. 245, 29 S.Ct. 445, 53 L. Ed. 782; *HENRY L. DOHERTY & CO. v. GOODMAN*, 294 U.S. 623, 55 S.Ct. 553, 79 L.Ed. 1097, *Black's Cas. Constitutional Law*, 2d, 719; *Connor v. Excess Ins. Co. of America*, 3 Cir., 51 F.2d 626.

⁴³ *Steele v. Western Union Tel. Co.*, 206 N.C. 220, 173 S.E. 583, 96 A.L.R. 361.

⁴⁴ *People's Tobacco Co. v. American Tobacco Co.*, 246 U.S. 79, 38 S.

Cl. 233, 62 L.Ed. 587, *Ann.Cas.*1918C, 537.

⁴⁵ *Washington ex rel. Bond & Goodwin & Tucker v. Superior Court of Washington for Spokane County*, 289 U.S. 361, 53 S.Ct. 624, 77 L.Ed. 1256, 89 A.L.R. 653. See also *American Ry. Exp. Co. v. Fleishman, Morris & Co.*, 149 Va. 200, 141 S.E. 253.

⁴⁶ *Consolidated Flour Mills Co. v. Muegge*, 127 Okl. 295, 260 P. 745, reversed 273 U.S. 559, 49 S.Ct. 17, 73 L.Ed. 505.

it arising out of such business has not been determined. It seems to be unnecessary for statutes permitting service upon foreign corporations to require the statutory designee to notify the corporation.⁴⁷ It should be noted that due process does not require a state to provide a procedure for subjecting foreign corporations doing business within it to suits therein on transitory causes of action arising outside the state.⁴⁸

Actions Quasi-In-Rem

The purpose of a proceeding quasi-in-rem is to satisfy a personal claim against a defendant, upon whom it is impossible to make the service of process required for a personal action, by applying to its discharge such of the defendant's property as lies within the state. It differs from a proceeding-in-rem in that its principal aim is not the determination of conflicting claims to specific property but to secure satisfaction of a pecuniary demand against the defendant. It is usually invoked where the debtor is a non-resident who cannot be compelled to answer a personal action against him for the recovery of the amount due from him. A proceeding of this character is generally justified as an assertion by a state of its power to deal with property within its borders. It can, accordingly, be invoked only with respect to property that is within the state. Due process requires that the property which it is proposed to apply to the discharge of the personal obligation of the owner be seized at the commencement of the suit, and that the owner be given reasonable notice thereof and of the plaintiff's claim and a reasonable opportunity to be heard.⁴⁹ The seizure of the property or res must be made on the commencement of the proceedings.⁵⁰ The method in which such seizure must be effected varies with the character of the property. If it consists of bank deposits seizure may be validly effected by personally serving upon the bank notice of the proceedings⁵¹ or by serving it with a preliminary order enjoining

⁴⁷ See *Washington ex rel. Bond & Goodwin & Tucker v. Superior Court of Washington for Spokane County*, 289 U.S. 361, 53 S.Ct. 624, 77 L.Ed. 1256.

⁴⁸ *Missouri Pac. R. Co. v. Clarendon Boat Oar Co.*, 257 U.S. 533, 42 S.Ct. 210, 66 L.Ed. 354. For a discussion of service upon domestic corporations in personal actions against

them, see *Straub v. Lyman Land & Investment Co.*, 30 S.D. 310, 138 N.W. 957, 46 L.R.A.,N.S., 941.

⁴⁹ *Security Sav. Bank v. State of California*, 263 U.S. 282, 44 S.Ct. 108, 68 L.Ed. 301, 31 A.L.R. 391.

⁵⁰ See discussion in *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565.

⁵¹ *Security Sav. Bank v. State of*

it from paying out any part thereof.⁵² It may also be effected by serving notice of garnishment upon the debtor of one against whom the proceedings are being commenced.⁵³ Any procedure that has the effect of attaching the property and bringing it within the jurisdiction of the court for disposition in accordance with its decision on the claim to whose payment it is sought to be applied is sufficient.⁵⁴ There are, however, other conditions that must be met to satisfy the demands of due process. The defendant owner of the seized property is entitled to notice of the proceedings in order that he may have an opportunity to be heard on the claim to whose payment the property is sought to be applied.⁵⁵ This requires some form of service of proper process upon him. Service by publication is valid in the case of non-residents.⁵⁶ It has not been fully determined how far, and under what conditions, it would be valid for resident defendants. There would seem to be no good reason for not permitting it under proper safeguards such as requiring personal service where his whereabouts are known, another form of substituted service than publication where that would be the most likely to reach him, and service by publication only as a last resort.⁵⁷ It has been held that, in the case of a contempt proceeding by the United States to collect a fine imposed upon an absent defendant, due process is satisfied by personal service upon him in a foreign country by an officer or employee of the United States of process in both the principal proceedings and the proceedings to forfeit the seized property in payment of the fine imposed upon him in the principal proceedings.⁵⁸ The result was based on the duty of a federal citizen to obey a summons from the United States to return to it on its demand, and would probably not be sustained if a state attempted such proceedings.

California, 263 U.S. 282, 44 S.Ct. 108, 68 L.Ed. 301, 31 A.L.R. 391.

⁵² PENNINGTON v. FOURTH NAT. BANK OF CINCINNATI, OHIO, 243 U.S. 269, 37 S.Ct. 282, 61 L.Ed. 713, L.R.A.1917F, 1159, Black's Cas. Constitutional Law, 2d, 722.

⁵³ See Harris v. Balk, 198 U.S. 215, 25 S.Ct. 625, 49 L.Ed. 1023, 3 Ann. Cas. 1084.

⁵⁴ McInnes v. McKay, 127 Me. 110, 141 A. 699.

⁵⁵ Security Sav. Bank v. State of California, 263 U.S. 282, 44 S.Ct. 108, 68 L.Ed. 301, 31 A.L.R. 391. But see Corn Exchange Bank v. Coler, 230 U.S. 218, 50 S.Ct. 94, 74 L.Ed. 378.

⁵⁶ See Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565.

⁵⁷ See Black v. Banks, 327 Mo. 341, 37 S.W.2d 594.

⁵⁸ Blackmer v. United States, 284 U.S. 421, 52 S.Ct. 252, 76 L.Ed. 375.

Proceedings in Rem

The purpose of one of the usual types of proceedings in rem is to determine claims to property situated within the state. Due process in these proceedings also requires the property in question to be seized at the commencement of the proceedings, and that those whose interests are to be affected by the judgment be given reasonable notice and an opportunity to be heard.⁵⁹ The problem of seizure of the property is similar to that in the case of proceedings quasi-in-rem. The notice required by due process varies with the position of those having possible adverse claims in the property. Due process is satisfied by a procedure that requires actual personal service upon known resident claimants, and service by publication in the case of unknown claimants or non-residents beyond the state's jurisdiction.⁶⁰ The notice should contain a sufficient description of the property to identify it to possible adverse claimants.⁶¹ Procedures similar to this have been sustained in proceedings for the administration of the estates of persons dying intestate and without heirs,⁶² proceedings for the administration of the estates of persons who have not been heard from for a sufficiently long period to create a rebuttable presumption of their death,⁶³ and in proceedings to quiet title to realty.⁶⁴ It is customary in proceedings to administer the estates of absent persons to protect their rights in case of their return, and due process would undoubtedly require this.

The other principal class of proceeding in rem are those commenced for the purpose of determining matters of personal status. Divorce proceedings belong in this class. The marital relation is treated as the res. This must be within the jurisdiction of both the state and of the court in which the proceedings are had. There is some uncertainty as to what facts will suffice to give a state jurisdiction to have its courts render an effective decree of divorce entitled to full faith and credit in other states. It is, however, generally held that it cannot do so

⁵⁹ See *Security Sav. Bank v. State of California*, 263 U.S. 282, 44 S.Ct. 108, 68 L.Ed. 301, 31 A.L.R. 391.

⁶⁰ *American Land Co. v. Zeiss*, 219 U.S. 47, 31 S.Ct. 200, 55 L.Ed. 82.

⁶¹ *American Land Co. v. Zeiss*, 219 U.S. 47, 31 S.Ct. 200, 55 L.Ed. 82.

⁶² *Hamilton v. Brown*, 161 U.S. 256, 16 S.Ct. 585, 40 L.Ed. 491.

⁶³ *Cunnius v. Reading School Dist.*, 198 U.S. 458, 25 S.Ct. 721, 49 L.Ed. 1125, 3 Ann.Cas. 1121; *Blinn v. Nelson*, 222 U.S. 1, 32 S.Ct. 1, 56 L.Ed. 65, Ann.Cas.1913B, 555.

⁶⁴ *Arndt v. Griggs*, 134 U.S. 316, 10 S.Ct. 557, 33 L.Ed. 918; *Jacob v. Roberts*, 223 U.S. 261, 32 S.Ct. 303, 56 L.Ed. 429.

unless it is the domicile of at least one of the parties to the proceedings. The confusion concerns the situation in which one of the parties is assumed to be domiciled in the state of which the defendant in the proceedings is a non-resident. The issue is as to the jurisdiction of the state and its courts of the subject-matter of the action. Due process, however, also requires some form of notice and opportunity to be heard by the defendant. Notice by publication satisfies due process in the case of non-resident defendants, and, perhaps, in that of resident defendants where actual or other forms of substituted service are impossible.⁶⁵

Effect of Appearance

A personal appearance by the defendant, if general, is always sufficient to confer jurisdiction over him upon a court, regardless of the nature of the proceedings. Statutes have sometimes been enacted that defendants appearing specially to contest the jurisdiction of the court shall by that act submit themselves as fully to the jurisdiction of the court as would their general appearance in the case. These statutes do not deny the defendants due process.⁶⁶ It has also been held that a statute permitting a non-resident, who has commenced a personal action against a resident defendant, to be served in a cross-action by service upon his attorney in the main action does not deny him due process.⁶⁷ A person once within a court's jurisdiction remains therein for purposes of the entire proceeding.⁶⁸

JURY TRIAL IN CIVIL CASES

339. The Seventh Amendment to the federal Constitution provides that "In suits at the common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."
340. The constitutions of many of the states also secure to suitors a right of trial by jury in civil cases with varying degrees of completeness.

⁶⁵ This whole matter is discussed in Chapter 5, Section 100, to which reference is hereby made.

⁶⁶ *York v. State of Texas*, 137 U.S. 15, 11 S.Ct. 9, 34 L.Ed. 604; *Western Life Indemnity Co. of Illinois v.*

Rupp, 235 U.S. 261, 35 S.Ct. 37, 59 L.Ed. 220.

⁶⁷ *Adams v. Saenger*, 303 U.S. 59, 58 S.Ct. 454, 82 L.Ed. 649.

⁶⁸ *Michigan Trust Co. v. Ferry*, 228 U.S. 346, 33 S.Ct. 550, 57 L.Ed. 867.

Jury Trial in Federal Courts

The provisions of the Seventh Amendment apply only to the trial of suits at the common law in federal courts, including the courts of those of the territories of the United States that have been incorporated within it.⁶⁹ They do not apply to such trials in state courts even when the rights which the plaintiff seeks to enforce therein originate in federal legislation.⁷⁰ A federal statute that permits the enforcement of such rights in state courts does not transform those courts into federal courts for the purpose of trying such cases, and the view that the Seventh Amendment would apply to their trial of such cases on that theory has been rejected.⁷¹ It should be noted, however, that that part of the Amendment which limits the manner for the re-examination in a federal court of facts tried by a jury is not limited to the cases in which the facts have once been tried by a jury in a federal court, but includes those in which they have once been tried by a state court. Thus a federal statute has been held to violate this provision which authorized the removal of certain suits against federal officers from state courts to federal courts for a trial *de novo* in the latter even though a verdict had already been rendered in the case in the state court and judgment entered on its basis.⁷² The Supreme Court has also held that said provision prohibits its re-examination of facts tried by a jury in a state court when the judgment therein is brought before it for review.⁷³ The limitation on the re-examination of facts tried by a jury is one on the federal courts only, but it applies whether the facts were originally tried by another federal court or a state court.

The right to a jury trial is not extended to all civil actions but only to suits at the common law where the value in controversy exceeds twenty dollars. The courts have been guided almost entirely by historical considerations in determining what proceedings are to be deemed suits at the common law. This has been based on the theory that the purpose of the Seventh Amend-

⁶⁹ *Springville City v. Thomas*, 166 U.S. 707, 17 S.Ct. 717, 41 L.Ed. 1172.

Bombolis, 241 U.S. 211, 36 S.Ct. 595, 60 L.Ed. 961.

⁷⁰ *Minneapolis & St. L. R. Co. v. Bombolis*, 241 U.S. 211, 36 S.Ct. 595, 60 L.Ed. 961; *Chesapeake & O. R. Co. v. Carnahan*, 241 U.S. 241, 36 S.Ct. 594, 60 L.Ed. 979.

⁷² *The Supreme Justices v. Murray*, 9 Wall. 274, 19 L.Ed. 658.

⁷³ *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979.

⁷¹ *Minneapolis & St. L. R. Co. v.*

ment was to preserve the right of jury trial as it existed under the English common law when the Amendment was adopted. The distinctions between suits at the common law and proceedings in equity and in admiralty had been established in that law long before the adoption of the Amendment. It has, accordingly, been stated, and never disputed, that suits of equity or admiralty jurisdiction are not within its provisions.⁷⁴ A person's rights under it are not violated by denying him the right to sue at law in a federal court on a claim against the receiver of railroad properties without the consent of the court in which the receivership proceedings were being conducted.⁷⁵ The proceedings authorized by the various bankruptcy acts are not suits at the common law, and hence a person's constitutional right to a jury trial is not infringed by authorizing the court to examine and set aside transfers of property made by the bankrupt to his counsel for services to be rendered.⁷⁶ Proceedings for the collection of governmental revenues are not deemed suits at common law, and a statute making an executive official's appraisal of the value of dutiable imports final does not violate the importer's right to a jury trial by depriving him of a right to have a jury decide that issue.⁷⁷ The proceedings provided for submitting claims against the government to judicial determination have never been considered suits at common law, and hence no jury trial need be provided for therein. This has been held to extend not only to the issue of the amount claimed from the government but also to any set-offs or counterclaims which the government may assert therein. No jury is, therefore, required to pass on the latter issues.⁷⁸ The Court in the last two cases cited reinforced its decision by invoking the power of the government to impose conditions upon the right to import in the one, and on the privilege of suing the United States in the other. In line with the case last cited is that holding that a statutory proceeding authorized by a territorial legislature for the settlement of moral claims against one of its municipalities was not a suit at common law and that, therefore, the municipality was not entitled by the Seventh Amendment to have a jury determine the amount of such claims against it.⁷⁹ There was no right to a

⁷⁴ *Parsons v. Bedford*, 3 Pet. 433, 7 L.Ed. 732.

⁷⁵ *Barton v. Barbour*, 104 U.S. 126, 26 L.Ed. 672.

⁷⁶ *In re Wood*, 210 U.S. 246, 28 S. Ct. 621, 52 L.Ed. 1046.

⁷⁷ *Auffmordt v. Hedden*, 137 U.S. 310, 11 S.Ct. 103, 34 L.Ed. 674.

⁷⁸ *McElrath v. United States*, 102 U.S. 426, 26 L.Ed. 189.

⁷⁹ *Guthrie Nat. Bank v. City of*

jury trial in suits in equity, although the court could in its discretion call upon a jury to assist it in the decision of issues of fact. The fact that proceedings for the cancellation of naturalization certificates for fraud in their procurement are in the nature of equitable proceedings has been held the basis for a denial that the Seventh Amendment requires a jury trial therein.⁸⁰ The Supreme Court has, however, refused to permit the Seventh Amendment to be impaired through the device of permitting proceedings for the enforcement of legal rights, as distinguished from equitable rights, in courts of equity. It has held that, whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords plaintiff a plain and complete remedy without the intervention of a court of equity, the plaintiff must proceed at law because the defendant has a constitutional right to have a jury decide the issues of fact involved in such a controversy. An action for the recovery of the possession of real property, including damages for withholding it, must accordingly be brought in a court of law.⁸¹ Nor may the Amendment be circumvented by a proceeding permitting the blending of a claim cognizable at law with one cognizable in equity. Hence a state statute permitting the union in a single equitable proceeding of a demand for a simple contract debt and a demand to set aside an alleged fraudulent conveyance has been held to violate the Amendment so far as it was sought to bring such proceedings in a federal court.⁸² The Supreme Court admitted that the states have power to create equitable rights where none existed under English law at the time of the adoption of this Amendment, and that such rights were enforceable in the federal courts in proper cases, but also held that the Amendment itself limited the extent to which federal courts could validly be permitted to enforce such rights. It should also be noted that the Amendment operates as a limit on the power of Congress to require federal courts to conform their practice and procedure to that prevailing under the law of the state in which they sit.⁸³ The Seventh Amendment does not, however, guarantee a right to a jury trial in every case where the action is one for the enforcement of a legal, as

Guthrie, 173 U.S. 528, 19 S.Ct. 513, 43 L.Ed. 796.

⁸⁰ *Luria v. United States*, 231 U.S. 9, 34 S.Ct. 10, 58 L.Ed. 101.

⁸¹ *Whitehead v. Shattuck*, 138 U.S. 146, 11 S.Ct. 276, 34 L.Ed. 873.

⁸² *Scott v. Neely*, 140 U.S. 106, 11 S.Ct. 712, 35 L.Ed. 358.

⁸³ See *Parsons v. Bedford*, 3 Pet. 433, 7 L.Ed. 732.

distinguished from an equitable, right. A trial by a jury of twelve men before a justice of the peace was unknown in England and America when the United States became independent, and is, accordingly, held not to be a trial by jury within the meaning of the Seventh Amendment. The facts tried by a jury before a justice of the peace in the District of Columbia may, therefore, be re-examined by a jury in a court of general jurisdiction to which an appeal lies from the judgment entered in the court of the justice of the peace.⁸⁴ There are also certain summary proceedings in which no jury trial is required. It has thus been held that a summary judgment may be entered against the sureties on an appeal bond for the payment of a deficiency in a proceeding to foreclose a lien on the theory that the sureties had submitted themselves to be governed by the court's rules in this matter by becoming sureties.⁸⁵ The foregoing cases reveal the extent to which historical considerations have shaped the law defining what are suits at the common law within the meaning of the Seventh Amendment.

The next matter to be considered is what satisfies the requirements of the Seventh Amendment in the cases in which it requires a jury trial. It is a right to a "jury of twelve persons in the presence and under the superintendence of a judge empowered to instruct them on the law and advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence."⁸⁶ It does not require the retention of the old forms under which the common law insured the jury an opportunity to decide issues of fact. Hence the right is not violated by the appointment by a federal court of an auditor in aid of jury trials in cases involving long and complicated accounts where his findings are not made final but the ultimate decision is still left with the jury.⁸⁷ The procedure would be clearly invalid if the auditor's findings were required to be treated as final by the jury. Nor does it prevent the legislature from creating rebuttable presumptions as rules of evidence, since here too the ultimate decision on the facts of a given case remains with the jury.⁸⁸ It

⁸⁴ *Capital Traction Co. v. Hof*, 174 U.S. 1, 19 S.Ct. 580, 43 L.Ed. 873.

⁸⁵ *Pease v. Rathbon-Jones Engineering Co.*, 243 U.S. 273, 37 S.Ct. 283, 61 L.Ed. 715, Ann.Cas.1918C, 1147. See also *Bank of Columbia v. Okely*, 4 Wheat. 235, 4 L.Ed. 559.

⁸⁶ *Capital Traction Co. v. Hof*, 174 U.S. 1, 19 S.Ct. 580, 43 L.Ed. 873.

⁸⁷ *In re Peterson*, 253 U.S. 300, 40 S.Ct. 543, 64 L.Ed. 919.

⁸⁸ *Meeker v. Lehigh Val. R. Co.*, 236 U.S. 412, 35 S.Ct. 328, 59 L.Ed. 644.

does, however, involve permitting the jury to hear all the evidence, and hence a proceeding in which the trial judge directed a verdict for the plaintiff on the basis of testimony given in another trial, which both parties had agreed to accept as a basis for the decision in their case, denies the defendant his constitutional right to a jury trial where said testimony was not read to the jury.⁸⁹ Such a procedure is not validated merely because the trial judge considered that the evidence required a verdict for the plaintiff. Moreover, all of the issues of fact must be submitted to the jury. Hence where a jury returns a special verdict consisting of responses to questions propounded by the judge but which embrace a part only of the issues of fact involved in the case, a judgment based thereon and on "facts conceded or not disputed upon the trial" is invalid. It was held that such procedure amounted to submitting part of the facts only to the jury, and thus violated the constitutional right to a jury trial of the defendant against whom the judgment was rendered.⁹⁰ However, a statute authorizing special findings of fact by the jury, and providing for a judgment based upon them if they are consistent with the general verdict, does not violate the right to a jury trial guaranteed by the Seventh Amendment.⁹¹ The right guaranteed by that Amendment clearly does not require submission to a second jury of an issue once tried to a jury. Hence, where issues of fact are severable, a new trial may validly be granted as to some of the issues of fact without a resubmission of the others.⁹² That Amendment furthermore requires that the jury's verdict be unanimous. Hence a territorial law permitting a verdict by less than all the members of a jury composed of twelve persons violates it, and an Act of Congress attempting to confer upon a territorial legislature the power to enact a law permitting such a procedure would itself violate the Amendment.⁹³ The Amendment does not prohibit judicial or legislative regulation of procedure governing the methods of arriving at an issue. Hence a rule of court authorizing judgment for plaintiff in contract actions for defendant's failure to file an affidavit of defense where the plaintiff has filed an affidavit in sup-

⁸⁹ *Barney v. Schneider*, 9 Wall. 248, 19 L.Ed. 648.

⁹⁰ *Hodges v. Easton*, 106 U.S. 408, 1 S.Ct. 307, 27 L.Ed. 169.

⁹¹ *Walker v. New Mexico & S. P. R. Co.*, 165 U.S. 593, 17 S.Ct. 421, 41 L.Ed. 837.

⁹² *Gasoline Products Co. v. Champion Refining Co.*, 283 U.S. 494, 51 S.Ct. 513, 75 L.Ed. 1188.

⁹³ *Springville City v. Thomas*, 166 U.S. 707, 17 S.Ct. 717, 41 L.Ed. 1172.

port of his complaint does not deprive the defendant of his constitutional right to a jury trial.⁹⁴ It has also been held not to be denied by an Act of Congress which required appellants from a decision of a court of a justice of the peace in the District of Columbia to give security for the payment of the judgment appealed from as a condition to the right to appeal it to the trial court of general jurisdiction to which appeals were allowed for purposes of a trial *de novo*.⁹⁵ It should be noted that all of the cases herein considered involved suits in which the amount in controversy exceeded twenty dollars.

The Seventh Amendment has given rise to important questions concerning the powers of the trial judge in a case in which it requires a jury trial. His power to instruct the jury on the law and advise them on the facts is universally admitted, as is his power to set aside their verdict and order a new trial if in his opinion it is against the law or the evidence.⁹⁶ The question of how far the trial judge may validly condition the grant or refusal of a new trial upon conditions involving a modification of the amount of the damages awarded by the jury's verdict has been passed upon by the Supreme Court in two important cases. In the first of them the court denied the defendant's motion without his consent on condition that the successful plaintiff remit a part of the damages awarded him, a condition which the plaintiff accepted. The defendant contended that this was invalid as involving a review of the facts tried by a jury in a manner not according to the rules of the common law. The procedure was held not to violate the Seventh Amendment since the trial court was stated always to have had the power to set aside an excessive verdict and that the procedure involved in the case was merely an exercise of the same power in a lesser degree.⁹⁷ In the second of the cases the plaintiff moved for a new trial on the ground of the inadequacy of the damages awarded him by the verdict. The motion was denied on condition that the defendant consent to an increased amount, which he did. The plaintiff's consent was neither asked nor given. The Supreme Court decided that there existed no historical basis for the ex-

⁹⁴ *Fidelity & Deposit Co. of Maryland v. United States*, 187 U.S. 315, 23 S.Ct. 120, 47 L.Ed. 194.

⁹⁵ *Capital Traction Co. v. Hof*, 174 U.S. 1, 19 S.Ct. 580, 43 L.Ed. 873.

⁹⁶ See *Capital Traction Co. v. Hof*,

174 U.S. 1, 19 S.Ct. 580, 43 L.Ed. 873; *Baylis v. Traveler's Ins. Co.*, 113 U.S. 316, 5 S.Ct. 494, 28 L.Ed. 989.

⁹⁷ *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U.S. 69, 9 S.Ct. 458, 32 L.Ed. 854.

ercise of such a power by the trial judge, and that the plaintiff had been denied his constitutional right to a jury trial on the issue of damages. The earlier case was distinguished on the grounds that in it the jury had actually passed on the amount of the damages allowed whereas in the instant case it had not done so. The majority of the court refused to construe the Seventh Amendment in the light of a theory that the common law is a developing body of law.⁹⁸ A minority opinion relies in part upon that theory.

The trial judge possesses other powers the exercise of which have been held not to violate this Amendment. He may, after all the evidence is in, direct the jury to return a verdict for either party unconditionally,⁹⁹ or, after the plaintiff's case is closed, unconditionally direct a verdict for the defendant on the ground that the plaintiff has not proved his case and that a verdict for him would have to be set aside as a matter of law.¹ The jury is in such cases deemed in law to be deciding the issues of fact when it returns a verdict in pursuance of such directions, and a judgment based thereon is valid. It is somewhat uncertain as to whether the trial judge may, consistently with the Seventh Amendment, enter a non-suit against the plaintiff after he has closed the case and enter a judgment on the merits for the defendant. A decision which seemed to hold that such procedure was valid² was subsequently construed as merely holding that such proceeding was not invalid if the plaintiff is not thereby prevented from suing again on the same cause of action.³ The latter decision left no doubt that the Court deemed such procedure to violate the Seventh Amendment. The case is also important in its bearing on the problem of the power of the trial court to give judgment for one of the parties when the jury has rendered a verdict for the other. The Seventh Amendment prohibits a trial judge from so doing where the verdict is taken unconditionally since this is held to involve the judge's substitution of himself for the jury in ascertaining the facts of the case.⁴

⁹⁸ *Dimick v. Schiedt*, 293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 643.

² *Coughran v. Bigelow*, 164 U.S. 301, 17 S.Ct. 117, 41 L.Ed. 442.

⁹⁹ *Treat Mfg. Co. v. Standard Steel & Iron Co.*, 157 U.S. 674, 15 S.Ct. 718, 39 L.Ed. 853.

³ *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 33 S.Ct. 523, 57 L.Ed. 879, Ann.Cas.1914D, 1029.

¹ See *Baylis v. Traveler's Ins. Co.*, 113 U.S. 316, 5 S.Ct. 494, 28 L.Ed. 989.

⁴ *Pedersen v. Delaware, L. & W. R. Co.*, 229 U.S. 146, 33 S.Ct. 648, 57 L.Ed. 1125, Ann.Cas.1914C, 153. See

It has also been held that the right to a jury trial is violated where, after the trial judge had directed a verdict for the plaintiff subject to his opinion whether the facts proved were sufficient to render the defendant liable, he entered a judgment for the defendant notwithstanding said directed verdict.⁵ It has, however, been stated that there existed a common law practice of reserving questions of law arising during the trial by jury and taking verdicts subject to ultimate rulings on the reserved questions, and that the reservation carried with it the authority to make such ultimate disposition of the case as might be essential, under the rulings on the reserved questions, including the right to non-suit the plaintiff where he had obtained a verdict, entering a verdict or judgment for one party where the jury had given a verdict for the other, or making other essential adjustments.⁶ This would thus permit a judgment to be entered contrary to the verdict under the circumstances indicated, and would appear to make the decision in *Bayliss v. Traveller's Insurance Co.* of doubtful present authority. The general principle stated above was enunciated in a case involving the power of an appellate court to direct the trial court to enter a judgment contrary to the verdict of the jury which had been in favor of the plaintiff but taken subject to the reservation of motions by the defendant for a dismissal of the complaint and for a directed verdict in his favor. The trial court denied the motions and entered judgment on the verdict which the appellate court reversed with directions for a new trial. That court had refused to direct the trial court to render judgment for the appellant in reliance upon an earlier Supreme Court decision holding that such action would involve a violation of the Seventh Amendment as constituting a re-examination of the facts tried by a jury by a method other than according to the rules of the common law.⁷ Despite that decision the Supreme Court held that the appellate court should have directed the trial court to dismiss the case on its merits notwithstanding the verdict.⁸ The earlier decision

also *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 33 S.Ct. 523, 57 L. Ed. 879, Ann.Cas.1914D, 1029.

⁵ *Baylis v. Traveler's Ins. Co.*, 113 U.S. 316, 5 S.Ct. 494, 28 L.Ed. 989.

⁶ *BALTIMORE & CAROLINA LINE, INC., v. REDMAN*, 295 U.S. 654, 55 S.Ct. 890, 79 L.Ed. 1636,

Black's Cas. Constitutional Law, 2d, 724.

⁷ *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 33 S.Ct. 523, 57 L. Ed. 879, Ann.Cas.1914D, 1029.

⁸ *BALTIMORE & CAROLINA LINE, INC., v. REDMAN*, 295 U.S. 654, 55 S.Ct. 890, 79 L.Ed. 1636,

was held applicable only where the jury's verdict had been rendered unconditionally, and the application of the rule within those limits has been recently reaffirmed.⁹ It had once been stated, in construing the latter part of the Seventh Amendment, that the common law method for the re-examination of the facts once tried to a jury was by the trial court's grant of a new trial or by an appellate court's direction thereof by reason of some error of law committed in the trial.¹⁰ The methods considered above must now be added thereto.¹¹

The preceding discussion has considered what the Seventh Amendment requires. The Congress may at any time authorize jury trials in civil cases where that Amendment would not demand it. The constitutional right to a jury trial may be waived by the party entitled thereto, but courts are slow to find a waiver thereof.¹²

Jury Trials in State Courts

No provision of the federal Constitution requires a state to grant a jury trial in civil cases in its courts.¹³ The constitutions of many of the states, however, preserve the right to a jury trial. The process of defining the scope of such provisions is very similar to that adopted in defining the scope of the Seventh Amendment. Statutes at times create new remedies in addition to, or in substitution for, existing common law remedies. Workmen's compensation acts illustrate statutes of that type. State constitutional provisions protecting the right to a jury trial are generally held not violated by denying the right to a jury trial in proceedings for the enforcement of such remedies.¹⁴ The constitutions of many of the states have altered the number of persons that shall compose a jury, and also the rule requiring the verdict to be unanimous. The result has been that each state constitu-

Black's Cas. Constitutional Law, 2d, 724.

⁹ *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 57 S.Ct. 809, 81 L.Ed. 1177.

¹⁰ See *Parsons v. Bedford*, 3 Pet. 433, 7 L.Ed. 732.

¹¹ For another discussion of this part of the Seventh Amendment, U.S. C.A.Const., see *Capital Traction Co. v. Hof*, 174 U.S. 1, 19 S.Ct. 580, 43 L. Ed. 873.

¹² See *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 57 S.Ct. 809, 81 L.Ed. 1177.

¹³ See *Walker v. Sauvinet*, 92 U.S. 90, 23 L.Ed. 678; *Southern R. Co. v. City of Durham*, 266 U.S. 178, 45 S. Ct. 51, 69 L.Ed. 231.

¹⁴ *Grand Trunk Western R. Co. v. Industrial Commission*, 291 Ill. 167, 125 N.E. 748; *DeMay v. Liberty Foundry Co.*, 327 Mo. 495, 37 S.W.2d 640.

tion constitutes a separate problem. Space prevents any detailed consideration thereof.¹⁵

¹⁵ For cases discussing various state constitutional provisions, see *Coffin v. Coffin*, 55 Me. 361; *Cassidy v. Sullivan*, 64 Cal. 266, 28 P. 234; *Bellows v. Bellows*, 58 N.H. 60; *General Inv. Co. v. Interborough Rapid Transit Co.*, 235 N.Y. 133, 139 N.E. 216; *Peoples Wayne County Bank v. Wolverine Box Co.*, 250 Mich. 273, 230 N.W. 170, 69 A.L.R. 1024.

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